United Nations A/HRC/30/42

General Assembly

Distr.: General
7 September2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*

Summary

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence presents the key activities undertaken by him between July 2014 and June 2015.

The Special Rapporteur elaborates on the main elements of a framework for designing State policies regarding "guarantees of non-recurrence". Offering conceptual clarity to the term "guarantees of non-recurrence", the Special Rapporteur suggests structuring such policies around three main spheres of intervention. At the level of official State institutions, the report begins with a reminder of some basic conditions, including security and legal identity, and proceeds to offer a range of initiatives, including the ratification of relevant treaties; justice and security sector reforms; changes in security legislation; and constitutional reforms, incorporating the separation of powers principle, removing discriminatory provisions and incorporating a bill of rights. The Special Rapporteur then draws attention to two spheres of intervention, the potential of which has not been frequently examined as part of guarantees of non-recurrence, namely, civil society and the spheres of culture and personal dispositions. In these sections, the Special Rapporteur mentions the importance of legal empowerment and the creation of an enabling environment in order for civil society to discharge its crucial role. Finally, the Special Rapporteur emphasizes the preventive potential of education reform, arts and culture, and trauma counselling.

* Late submission.
** The annex to the present report is circulated as received, in the language of submission only.

GE.15-15026(E)

Please recycle

In conclusion, the Special Rapporteur emphasizes that "guarantees of non-recurrence" should be considered not as a rhetorical device but as an object of policymaking. The Special Rapporteur highlights that, in order to develop an effective preventive State policy, interventions in all three areas are necessary.

The Special Rapporteur's set of general recommendations for truth commissions and archives is presented in an annex to the present report.

Contents

		Page
I.	Introduction	4
II.	Activities of the Special Rapporteur	4
	A. Country visits and regional consultations	4
	B. Communications and press releases	4
	C. Other activities	4
III.	Guarantees of non-recurrence as part of a comprehensive transitional justice strategy	5
	A. Legal foundation	5
	B. Conceptual issues	6
	C. Framing considerations	8
IV.	Institutional interventions	10
	A. Basic preconditions	10
	B. Ratification of treaties	11
	C. Legal reforms	12
	D. Judicial reforms	13
	E. Constitutional reform	15
V.	Societal interventions	18
	A. Ceasing attacks and threats and removing obstacles	19
	B. Legal empowerment	19
	C. Creating enabling environments	20
VI.	Interventions in the cultural and the individual spheres	21
	A. Education	21
	B. Arts and culture	21
	C. Archives	22
	D. Trauma counselling and psychosocial support	22
VII.	Observations and recommendations	23
Annex	Set of general recommendations for truth commissions and archives	27

I. Introduction

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence pursuant to Human Rights Council resolution 27/3. In it, the Special Rapporteur presents the key activities undertaken from July 2014 to June 2015, and addresses the topic of establishing a policy on guarantees of non-recurrence in the aftermath of mass violations.

II. Activities of the Special Rapporteur

A. Country visits and regional consultations

2. The Special Rapporteur undertook a country visit to Burundi (see A/HRC/30/42/Add.1; A/HRC/30/CRP.1) and an advisory visit to Sri Lanka.[1] He thanks both Governments for their invitations and cooperation.

3. The Special Rapporteur is pleased to announce he will undertake a country visit to the United Kingdom of Great Britain and Northern Ireland in November 2015. A further invitation was extended by the Government of Côte d'Ivoire. Other pending visit requests concern Brazil, Cambodia, the Democratic Republic of the Congo, Guatemala, Guinea, Indonesia, Kenya, Nepal, Rwanda and Sri Lanka.

4. The Special Rapporteur will undertake a regional consultation on transitional justice for the Asia-Pacific region in December 2015. As with previous consultations, the results will form part of the study requested in paragraph 1 (f) of Human Rights Council resolution 18/7.

B. Communications and press releases

5. From July 2014 to June 2015, the Special Rapporteur sent communications to Chile, Egypt, Guatemala, Italy, Morocco, Nepal, Pakistan, the Philippines, Portugal, Serbia, Spain and the Russian Federation;[2] prepared an open letter to the United States of America; and issued press releases on Argentina, Bosnia and Herzegovina, Burundi, Colombia, Nepal, Spain and the United States.

C. Other activities

6. In August 2014, the Special Rapporteur participated as panellist in a national forum on victims, organized in Cali, Colombia, at the request of the peace negotiation representatives of the Government of Columbia and the Revolutionary Armed Forces of Colombia – People's Army (FARC-EP).[3]

7. During the period in question, the Special Rapporteur presented his report (A/HRC/27/56) addressing the topic of prosecutorial strategies in the aftermath of mass atrocities and his visit reports on Spain and Uruguay (A/HRC/27/56/Add.1 and A/HRC/27/56/Add. 2, respectively). In addition, he was a panellist in the Human

[1] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15820&LangID=E.
[2] See A/HRC/28/85, A/HRC/29/50 and A/HRC/30/27.
[3] See www.hchr.org.co/publico/pronunciamientos/ponencias/PDeGreiff_Cali_Agosto_2014.pdf.

Rights Council panel debate on history teaching and memorialization processes, and participated in side events on gender and transitional justice and experiences on the implementation of transitional justice measures. He met with representatives of Armenia, Cambodia, Colombia, Côte d'Ivoire, Guatemala, Japan, Nepal, the Netherlands, the Republic of Korea, Spain, Sweden, Switzerland, the United States and Uruguay, as well as several non-governmental organizations.

8. In September 2014, the Special Rapporteur, the International Committee of the Red Cross and the organization Swisspeace organized in Geneva an expert workshop entitled "Archives in the Context of the Right to Know".

9. Furthermore, in September 2014, the Special Rapporteur attended a regional conference in Guatemala on the role of the judiciary in the fight against impunity for international crimes.

10. In October, the Special Rapporteur, with the founding office of the Nuremberg Principles Academy, conducted an expert workshop on guarantees of non-recurrence, held in Nuremberg, Germany.

11. Also in October, he presented to the General Assembly his report (A/69/518) addressing reparations for victims in the aftermath of mass violations of human rights and of international humanitarian law.

12. In January 2015, the Special Rapporteur held meetings in Addis Ababa on the draft African Union Transitional Justice Framework, including with the African Union Commissioner for Political Affairs, the African Union Chairperson's Special Envoy on Women, Peace and Security, and donors agencies and non-governmental organizations.

13. In February 2015, the Special Rapporteur presented a keynote speech at the conference entitled "Truth Commissions and Peace Processes: International Experiences and Challenges for Colombia", organized by the Kofi Annan Foundation and the International Centre for Transitional Justice in Bogota.

III. Guarantees of non-recurrence as part of a comprehensive transitional justice strategy

14. In the present report, the Special Rapporteur addresses the topic of developing a State policy on guarantees of non-recurrence in the aftermath of mass violations, understood as part of a comprehensive transitional justice strategy. It is to be read in conjunction with the 2015 report of the Special Rapporteur, to be presented to the General Assembly at its seventieth session, in which the Special Rapporteur elaborates on the topic of transitional justice and security sector reform.

A. Legal foundation

15. International standards on guarantees of non-recurrence have grown significantly since 1993, when the term was first used in a United Nations report.[4] This is demonstrated, inter alia, by the explicit reference to "guarantees of non-repetition" in the International Convention for the Protection of All Persons from Enforced Disappearance.

[4] See E/CN.4/Sub.2/1993/8, paras. 47 and 48, and 55; and section IX, principle 11.

16. In 2004, the Human Rights Committee held that the purposes of the International Covenant on Civil and Political Rights "would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee ... to include ... the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question".[5]

17. The first jurisprudence by the Committee regarding right-to-life cases requiring States to "take steps to ensure that similar violations did not occur in the future" dates back to the 1980s.[6] The former Special Rapporteur, Theo van Boven, argued on that basis that "there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party".[7]

18. The general commitment to adhere to a right involves making efforts to ensure that its violation ceases and is not repeated. The duty to prevent recurrence is hence closely linked to the obligation of cessation of an ongoing violation. On this basis, "guarantees serve a preventive function and may be described as a positive reinforcement of future performance".[8]

19. Regional human rights courts and human rights treaty bodies have, with increasing frequency, issued orders related to guaranteeing non-recurrence. For example, the Inter-American Court of Human Rights has interpreted its remedial powers broadly and ordered remedies directed not only at victims, but also at communities and towards society at large. Significant progress by the Court includes a practice of requiring States to take measures to preserve the victim's memory or making relevant parts of its ruling public for educational purposes.[9] On legislative reform, the Court held that laws that place civilians under military court jurisdiction are a violation of the American Convention on Human Rights; consequently, it ordered the State to change the legislation.[10] Such orders are not uncommon in Court decisions. As the Court argued in its landmark *Velásquez Rodríguez* decision, States are obliged "to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights".[11]

B. Conceptual issues

20. Despite the significant growth of the relevant international standards, the term "guarantees of non-recurrence" requires elaboration regarding the following conceptual questions:

---

[5] See CCPR/C/21/Rev.1/Add.13, para. 17.

[6] See communications No. 88/1981, *Larrosa v. Uruguay*, Views adopted on 29 March 1983, para. 13; No. 124/1982, *Muteba v. Zaire*, decision on admissibility dated 25 March 1983, para. 13; and No. 176/1984, *Peñarrieta et al. v. Bolivia*, Views adopted on 2 November 1987, para. 18.

[7] E/CN.4/Sub.2/1993/8, para. 55.

[8] See Draft Articles on State Responsibility, article 30.

[9] See Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past* (Oxford University Press, 2008).

[10] Ibid. See also *Castillo Petruzzi et al. v. Peru*, Judgement of 30 May 1999, Inter-American Court of Human Rights, Ser. C, No. 52, para. 222.

[11] See *Velásquez Rodríguez v. Honduras*, Judgement of 29 July 1988, Inter-American Court of Human Rights, Ser. C, No. 4, para. 166.

(a) The "offer", as it is not clear what is meant by a "guarantee";

(b) The "object", as the reference in the foundational texts[12] to the non-recurrence of gross violation of human rights by States has widened to include the non-recurrence of "international crimes" committed by State and non-State actors, the non-recurrence of atrocities and even of the non-recurrence of violent conflict;[13]

(c) The "subject", or who the beneficiaries of the guarantees are supposed to be, i.e., the victims, a wider group of "potential" victims or society at large;

(d) The "duty bearers", i.e., those supposed to fulfil their obligation to provide said guarantees.

21. In the present report, the Special Rapporteur aims at contributing conceptual clarity about "guarantees of non-recurrence"; acknowledging the breadth of the field, yet giving it some structure, without being necessarily comprehensive; and highlighting areas that have not received appropriate attention.

22. Furthermore, the main interests underlying the report are practical, and aim to show that the topic can be concretely acted upon; demonstrate that it is a fit object of rational policymaking, including planning, budgeting and monitoring; and offer a general framework for designing an actionable non-recurrence policy.

23. Conceptually, there is a difference between guarantees of non-recurrence and the remaining three core elements of a comprehensive transitional justice approach, namely, truth, justice and reparation. While those three elements refer to measures, guarantees of non-recurrence is a function that can be satisfied by a broad variety of measures. The foundational texts already demonstrate this variety, pointing to, inter alia, reforming institutions, disbanding unofficial armed groups, repealing emergency legislation incompatible with basic rights, vetting the security forces and the judiciary, protecting human rights defenders and training security forces in human rights.

24. The core function of guarantees of non-recurrence is preventive in nature. It is one to which truth, justice and reparation are themselves supposed to contribute: criminal justice mainly through deterrence; truth commissions through disclosure, clarification and the formulation of recommendations with a preventive intent; and reparations by strengthening the hand of victims to claim redress for the past and future violations and to enforce their rights more assertively.

25. The preventive intent is the unifying thread in the foundational texts. Framing an indicative reply to the aforementioned conceptual questions, the "offer" of guarantees of non-recurrence relates to a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring violations. The "object" is not the prevention of isolated violations, but of gross human rights violations and serious violations of international humanitarian law. Such violations presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up.

26. The present report is written on the understanding that the "subject" of the guarantees is the previously victimized society, seen at large, thus not limited to the

[12] E/CN.4/Sub.2/1997/20/Rev.1; E/CN.4/2004/88; General Assembly resolution 60/147; and E/CN.4/2005/102/Add.1.

[13] See S/2004/616.

direct or indirect victims.[14] Given the Special Rapporteur's interest in exploring the development of preventive policies, State institutions will be the main "duty bearers". Nonetheless, considering the diversity of the potential elements of a comprehensive policy, those bearers are ultimately manifold.

27. Guarantees of non-recurrence are a function that can be satisfied by diverse measures. Thus, there is no such thing as a general non-recurrence policy. An effective policy designed to prevent systemic violations will need to adjust form to function and choose the proper instruments.

C. Framing considerations

28. Three general considerations are relevant. First, transitional justice programmes have not taken into account sufficiently the significant differences between the post-authoritarian contexts, where the model of transitional justice originally took shape, and the situations of (post-)conflict and fragility in which it is now predominantly implemented. Two important differences relate to degrees of (State) institutionalization and the types of violations, abuses and harms requiring redress.

29. These differences play out as follows: criminal trials, truth commissions and reparations programmes all rest upon certain institutional preconditions that are not satisfied in all settings. Furthermore, those measures are effective instruments for redressing certain kinds of violations and not others. The transfer of the model from the post-authoritarian context to the (post-)conflict setting has taken place with virtually no functional analysis.

30. The same applies to guarantees of non-recurrence: the institutional context, its characteristics, capacities and history all matter, as do the cultural circumstances and individual dispositions. Preventing mass violations does not call for the same specific measures regardless of those factors. Similarly, the (risk of) prevalence of some (patterns of) violations should naturally shape a prevention policy for a given country.

31. In addition, transitional processes are dynamic. Therefore, besides allowing for functional adequacy between means and ends and suitability to context, the design of the policies to implement transitional justice elements should take into account fittingness to a certain stage in a process. Thus, what is necessary and feasible for prevention changes over time, not only as institutional characteristics change, but also as the horizon of possibilities shifts.

32. Furthermore, the sort of transformations that are called for in order to approximate anything resembling guarantees of non-recurrence following mass violations cannot be achieved through "institutional engineering" or institutional reforms alone. The challenge of achieving justice retrospectively and prospectively is not merely a technical one. Lasting societal transformations require interventions not only in the institutional sphere but also in the cultural sphere and at the level of personal, individual dispositions. While culture and "character" play a stabilizing function in social relations, and as such are by nature relatively immune to deliberate change, they are not immutable altogether. Hence, in the present report, the Special

[14] See Juan E. Méndez, "Accountability for Past Abuses", *Human Rights Quarterly*, Vol. 19, No. 2, p. 261 (May 1997).

Rapporteur pays attention to interventions in the cultural and the personal domains that have received comparatively less attention.

33. Economic conditions and their relation to non-recurrence with a view to meaningful transformation is a topic that does not receive sufficient focus. As argued in previous reports, transitional justice cannot be thought to exhaust the agenda of thorough political, social and economic transformation that is called for in the aftermath of mass violations.

34. Although the causes of violence or violations of rights cannot be reduced to inequality or poverty, singly or jointly, or to any straightforward combination of social indicators, it is well known that both inequality and poverty correlate robustly with violence and the violations of various rights, including civil and political, and economic, social and cultural.[15] Most of the violent conflicts in the world take place in countries that are or have been deeply afflicted by large inequalities, poverty, and often both.

35. There are forms of economic exclusion that, if entrenched over time, may be particularly detrimental to the enjoyment of rights. Persistent and durable inequalities, but also some of the inequalities associated with rapid but highly uneven economic growth, have been argued to be associated with both social discontent and increases in criminal activities, violence and civil conflict.[16]

36. The continuation in power of an abusive regime makes it impossible to guarantee that violations will not be repeated. In some of these contexts, lack of economic opportunities outside government-paid posts raises decisively the stakes of losing power. This motivates the entrenchment of abusive regimes, increasingly also observed through the subversion of democratic processes, and consequently undermines the possibility of offering effective guarantees of non-recurrence. These cases provide a compelling illustration of the economic and developmental dimension to prevention, which must no longer be ignored and should be more thoroughly analysed.

37. In the present report, the Special Rapporteur presents a range of interventions from easily actionable to more ambitious, demanding interventions. This is not a causal sequence. No intervention, large or small, on its own, in any of the three spheres, is likely to offer sufficiently strong guarantees. The multidimensional character of conflict and of rights violations needs to be matched by multidimensional responses. The Special Rapporteur also demonstrates that there is always something that can be done in order to diminish the likelihood of repeated violations. Therefore, neither cost nor complexity of interventions is a legitimate excuse for inaction.

[15] See A/HRC/29/31. See also World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, D.C., 2011).

[16] See P. Justino, *Shared Societies and Armed Conflict: Costs, Inequality and the Benefits of Peace*, Institute of Development Studies (London, 2012).

IV. Institutional interventions

A. Basic preconditions

1. Security for all

38. Much reflection about redressing rights violations simply makes assumptions about what is missing in the majority of the cases at hand, namely, functional State institutions. In their original intent, human rights instruments were designed to address — and in fact to redress and correct — abuses of State power. A great deal of abuses, however, today takes place in areas of limited governance and by non-State actors. Moreover, it should be highlighted that it is usually the most marginalized who bear the brunt of the violations; the better-off have always more exit options and can translate economic power into some degree of security. Non-recurrence policies need to pay attention to the provision of effective security for all in full compliance with all relevant rights-related standards including equality and fairness.

2. Legal identity

39. Proof of legal identity is crucial for the exercise of rights and for gaining access to State services. It is generally a precondition for, inter alia, participating in most administrative and judicial proceedings, including those related to the violation of fundamental rights; settling questions relating to civil status; voting or standing for election and being appointed to office; obtaining a nationality and a passport; gaining access to social security or other forms of State support; taking part in commercial transactions, including entering contracts; opening bank accounts; and acquiring a title to property.

40. International and regional human rights law recognize the right to legal identity[17] in time of peace and conflict. According to the United Nations Children's Fund (UNICEF), approximately one third of all children under five worldwide have never been registered.[18] Statelessness, which affects more than 10 million people, according to the Office of the United Nations High Commissioner for Refugees (UNHCR), compounds the problem.[19] Conflict negatively affects legal identity through: (a) the absence or weakening of State presence and services; (b) migration and displacement, often involving the loss of documents and the impossibility of obtaining new ones; (c) fear and intimidation, for example, children being relocated and forcibly conscripted; and (d) the deliberate destruction of registries, as has happened during conflicts at least in Guatemala, Peru, Bosnia and Herzegovina and Timor-Leste. In Cambodia, during the Khmer Rouge regime in the 1970s, all documents relevant to civil status were destroyed. In Sierra Leone, where thousands of children were abducted and forced to fight during the 10-year conflict, many had

---

[17] See International Covenant on Civil and Political Rights, art. 24; Convention on the Rights of the Child, arts. 7 and 8; International Convention for the Protection of All Persons from Enforced Disappearance, art 25; African Charter, art. 6; and American Convention on Human Rights, arts. 3 and 18.

[18] See UNICEF, "Every Child's Birth Right: inequalities and trends in birth registration" (New York, 2013), available from www.unicef.org/media/files/Embargoed_11_Dec_Birth_Registration_report_low_res.pdf.

[19] See UNHCR, *2013 Statistical Yearbook* (Geneva, 2013), available from www.unhcr.org/54cf99f29.html.

no registration of their birth and lacked the means to trace their identity and identify their families or communities.[20]

41. Officially recognized identity, substantiated through birth certificates or identity documents, is a gateway for the realization of most fundamental rights. Legal identity is important for the purpose of having rights respected, for claiming them and for obtaining redress when they are violated. Addressing the challenges of legal registration in the aftermath of conflict or repression provides an opportunity to establish, restore or strengthen the foundations of a national registry that is compulsory, universal, permanent and continuous, which secures the confidentiality of personal data and is sensitive to cultural circumstances, including of minorities and religious or indigenous groups. By facilitating statistical data, legal registration can assist a Government to better plan, implement and monitor its service provision and efforts towards the realization of the rights of the individuals and development objectives. Addressing legal identity concerns in post-conflict or post-authoritarian contexts provides a way for transitional justice mechanisms to have an impact beyond their direct sphere of influence.

B. Ratification of treaties

42. While legal identity is a precondition for the exercise of rights, there are measures that can proactively promote rights, both retrospectively, by redressing their violation, and prospectively, by trying to prevent the violations. Some of these tools have received legal expression in international treaties. A basic step in the articulation of a non-recurrence policy, therefore, consists in the ratification of relevant treaties concerning gross human rights violations and serious violations of international humanitarian law.[21] States should avoid, or withdraw, any reservation that could raise doubts as to their compatibility with the object and purpose of the treaty.

43. Because no law is self-executing, ratification alone can at best be taken as a signalling device, which has the potential for misuse as "window dressing", in which case ratification can be followed by a worse human rights performance.[22] Nevertheless, ratification, exemplifying what has been called "the paradox of empty promises",[23] can lead to greater compliance if accompanied by various forms of advocacy.[24]

44. Except for pure "monist" legal systems, ratification can lead to greater compliance only if accompanied by the incorporation of treaty obligations into domestic legislation. In such systems, therefore, a basic element of a non-recurrence policy will require, in addition to ratification, a strategy of incorporation (and desirably of monitoring and enforcement).

---

[20] Ibid.

[21] See key international instruments, available from www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx.

[22] See Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale Law Journal*, Vol. 111, No. 8 (2002).

[23] See Emilie M. Hafner-Burton and Kiyoteru Tsutsui, "Human Rights in a Globalizing World: The Paradox of Empty Promises", *American Journal of Sociology*, Vol. 110, No. 5 (2005).

[24] See Tomas Risse et al, *The Persistent Power of Human Rights* (Cambridge University Press, 2013).

C. Legal reforms

45. The incorporation of international legal obligations should at least cover the following basic issues: the typification of relevant crimes; statutes of limitations and retroactivity questions; and the introduction of reforms leading to de-incentivizing violations, including regarding anti-terrorism legislation.

1. Criminal types, statutes of limitation and retroactivity issues

46. The focus here is placed on the inclusion of measures that enable judicial and non-judicial remedies for redressing gross human rights violations and serious international humanitarian law violations.

47. The incorporation of criminal types (offences) on the basis of international law has the advantage not only of accurately reflecting international obligations, but also of solving two problems that have increasingly become an excuse for inaction in the face of systematic or widespread violations, namely, prescription and retroactivity issues.

48. Common crimes in domestic jurisdictions are generally accompanied by prescription regimes. The reasons to make "atrocity crimes" imprescriptible are, first, that atrocity crimes raise particular investigatory and prosecutorial challenges that usually cannot be met on the same schedule as common crimes; and second, that imprescriptibility helps signal that such crimes constitute an affront to humanity, communicating that, in theory, neither space nor time will provide escape from responsibility.

49. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[25] which also covers crimes of genocide and those associated with apartheid, states that the relevant crimes are imprescriptible "irrespective of the date of their commission". International jurisprudence has frequently reiterated that the Convention does not create new rights or obligations, but that it is declarative in nature, and that the principle of imprescriptibility of war crimes, crimes against humanity and genocide is a matter of *jus cogens*.[26]

50. This helps to address claims regarding the retroactive application of criminal law or violations of the principle of legality, in particular, of the principle that no one should be punished for an act that was not proscribed by a law in force at the time of commission.[27] Jurisprudence from various courts shows the ways in which different countries have confronted some of these challenges. Some countries have carried out judicial processes for gross human rights violations using criminal types current in their penal codes at the time of their commission, but, judging the offences to be crimes against humanity in accordance with *jus cogens*, they have attributed to those violations some of the characteristics and consequences of international crimes, such

[25] General assembly resolution 2391 (XXIII), 1968.

[26] See, for example, *The Prosecutor v. Klaus Barbie* (Supreme Court, France); *Kolk and Kislyiy v. Estonia* (European Court of Human Rights); *Priebke*, and *Arancibia Clavel* (Supreme Court, Argentina); *Molco* (Supreme Court, Chile); *Barrios Altos*, and *Gelman* (Inter-American Court of Human Rights).

[27] See Universal Declaration of Human Rights, art. 11 (2); International Covenant on Civil and Political Rights, art. 15; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7; American Convention on Human Rights, art. 9.

as imprescriptibility.[28] Other courts have carried out judicial processes using criminal types that may have not been present in national codes when the acts were committed, arguing that this does not violate the principle of legality if international law already declared the acts in question to be illegal when they were committed.[29] Indeed, domestic and international courts have found ways to guarantee simultaneously respect to the principle of legality as well as due process and fair trial standards for the defendants, and to the rights of victims to see the perpetrators of violations brought to justice.[30]

2. Emergency, security and counter-terrorism legislation

51. Another crucial legislative reform that is not particularly onerous in terms of expenses or complexity is to ensure that emergency, anti-terrorism or other security-related legislation is fully compatible with human rights standards, so that it does not incentivize violations of rights. Authoritarian regimes, regimes mired in conflict and, for years now, States involved in so-called "wars on terrorism" almost invariably adopt legislation that goes well beyond the objective security needs that purportedly motivate it.[31] Such laws have been seriously misused to justify gross human rights violations. For example, in addition to allowing for prolonged periods of "preventive" detention, constraining access to defence lawyers, the absence of the review of the legality of detention by a court, among other limitations of rights, these laws either directly or indirectly promote, even instigate, the violation of rights. This is the case, for example, with the singly objectionable, jointly pernicious, removal of bars on the use of evidence that may have been obtained illegally, frequently by coercion, and the weakening of the safeguards under which "confessions" can be given by detainees.

D. Judicial reforms

52. Given the importance of an independent and effective judiciary in securing rights — but also of acknowledging the dubious role some judiciaries have played in pre-transitional periods in some countries — it is somewhat surprising that judicial reform has not played a more prominent role in discussions about guarantees of non-recurrence. This is in spite of recommendations made by many truth commissions in relation to judicial reform and the fact that many transitional countries have reformed their justice systems.[32] This serves as a good illustration of the lack of focus and strategy in discussions about guarantees of non-recurrence, and of the disconnect between transitional justice and other policy interventions with which it coexists but rarely interacts.

53. In the aftermath of mass violations, committed sometimes with the collaboration of the judiciary, or in any case having shown itself an insufficient bulwark against the violations, there are three important issues that should be tackled in order to help prevent future violations: (a) screening judicial personnel; (b)

---

[28] See *Arancibia Clavel* and *Simón* (Supreme Court, Argentina); and *Fujimori* (Specialized Criminal Law Chamber, Peru).

[29] See Special Tribunal for Lebanon, Appeals Chamber, *STL-11-01/I*, paras.132 and 133; *Pérez García* (Colombia).

[30] See *Scilingo* and *Pinochet* (National High Criminal Court, Spain); *Gelman*.

[31] See A/HRC/16/51/Add.2, and A/HRC/25/59/Add.2.

[32] See Linn A. Hammergren, *Justice Reform and Development. Rethinking Donor Assistance to Developing and Transitional Countries* (Routledge, Oxford, 2014).

strengthening judicial independence; and (c) strengthening judicial competencies in areas specifically important for preventive purposes.

54. If judiciaries virtually everywhere can at times be subjects of mistrust, in contexts of past mass violations, some are so tainted with complicity that it is virtually impossible for them to gain trust without a major vetting or screening of their personnel, from the top down. Particularly in places in which higher court judges have responsibilities for the administration of courts, including case allotment, judicial career and disciplinary procedures, as well as a voice in decisions about judicial reforms, a judiciary entirely appointed by a predecessor regime, seen as complicit in past mass violation, will stand in need of major personnel review.

55. The vetting of judges poses particular challenges because procedures need to respect the separation of powers, judicial autonomy, due process guarantees and, if it exists, the general principle of the irremovability of judges, which may only be transgressed in exceptional cases.[33] Furthermore, even a judiciary dependent on the executive power is, in most cases, far from being a powerless branch. Some countries under quite difficult circumstances have managed to vet the judiciary, showing respect for the relevant principles, including due process. The latest country to embark in such a project has been Kenya.[34]

56. Continuing judicial training should include information about the role of the judiciary in past violations; the capacity to self-criticize needs to be exemplified by the judiciary above all branches of government.

57. Changes in personnel are insufficient to turn ineffective or complicit judiciaries into trustworthy arbiters and reliable guarantors of rights. Prospectively, structural changes are necessary, including means to strengthen judicial independence, as many truth commissions have recommended.[35] Without such reforms, the likelihood that courts will (at least) dare to check executive powers will not increase significantly, and will be entirely dependent on the virtue of particular individuals.

58. There is no single reform that can guarantee that judges will act independently. However, opportunities for individuals to exercise judgement independently are increased if they are offered certain protections, including recruitment on the basis of merit and objective criteria; security of tenure; adequate terms of service, for example, remuneration and predictable conditions of retirement; and transparent, reliable disciplinary processes, for example, fair procedures, proportionate sanctions, promotions, dismissals and transfers, so that the fears of losing their jobs, not being promoted or being arbitrarily transferred to an undesirable location do not influence their opinions.

59. Guaranteeing the physical safety of judges is a decisive condition of the exercise of independent judgement.

---

[33] See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 30.

[34] For an overview of the vetting structures and procedures, see International Commission of Jurists, Kenya Section, available from www.icj-kenya.org/index.php/resources/publications/papers-dl.

[35] For El Salvador, S/25500 (1993), pp. 172ff. Guatemala see www.derechoshumanos.net/lesahumanidad/informes/guatemala/informeCEH.htm, vol. 3, ch.16; for Chile, see www.usip.org/sites/default/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf; and for Sierra Leone, see www.sierraleonetrc.org/index.php/view-the-final-report/table-of-contents, vol. 2, chap. 3, paras. 39, 104-106 and 132-163.

60. In addition to guaranteeing the individual independence of judges, it is also important to strengthen the institutional independence of the judiciary. This can be accomplished by enshrining the separation of powers in constitutional texts and/or practices; using methods for appointing judges and magistrates that signal a valuation of competence and independence rather than political affiliation; endowing the judiciary with sufficient resources and providing it with budgetary and administrative autonomy; ensuring that cases are assigned on the basis of objective criteria; and respecting and enforcing the decisions of courts, even when they are contrary to the interests of the executive or its supporters, including regarding significant issues for the Government, such as electoral questions.

61. For the adjudication of cases involving mass violations, judicial systems need to build and further develop specialized capacities regarding the widespread and systemic nature of violations and the identification of respective patterns and nodes in networks of systemic crimes, as they require a change in investigative, prosecutorial and adjudication techniques and practices.[36] In many jurisdictions, familiarity with international human rights and humanitarian law is weak to non-existent. Familiarity with the peculiarities of "structure crimes",[37] such as genocide, crimes against humanity and war crimes, which rest upon a network of actors, is even scarcer. Dismantling networks of such criminality, some of which are ensconced in State institutions, i.e. in torture cases, through the implementation of an appropriate strategy ably pursued by prosecutors and competently adjudicated by judges is one of the most effective contributions a judicial system can make to preventing the recurrence of violations. Such capacities are sometimes best expressed and built in the establishment of specialized (pre-)investigatory offices, courts or tribunals.

E. Constitutional reform

62. The following is a set of constitutional issues, presented in a rough ascending order of complexity, that transitioning countries could make part of their non-recurrence policy.

1. Removing discriminatory provisions, introducing mechanisms of inclusion

63. The removal from constitutions and other laws or by-laws of any provisions that may fuel discrimination, a well-known source of social strife, is likely to contribute to the prevention of violations. Several truth commissions and peace agreements have made recommendations to this effect. For instance, the Sierra Leonean Truth and Reconciliation Commission recommended removing racist and sexist provisions governing citizenship, arguing that citizenship should be acquired by birth, descent or naturalization. In Morocco, the *Instance équité et réconciliation* argued for a constitutional prohibition on all forms of internationally prohibited discrimination and any incitation to racism, hatred or violence. The Arusha Peace and Reconciliation Accord (2000), which aimed at settling the conflict in Burundi, banned all political or other associations that advocated ethnic, religious or gender discrimination, and laid the basis for the consociational power-sharing agreement.

[36] See A/HRC/27/56, paras. 88-91.
[37] Ibid., para. 71.

which the 2005 Constitution set in place, and on which peace in Burundi still hinges.[38]

64. Truth commissions and peace agreements have advocated for introducing mechanisms of inclusion into constitutional texts. The Guatemalan Peace Accord, for example, emphasized the need to define the country as multi-ethnic, multicultural, and multilingual at the constitutional level. The Guatemalan Commission on Historical Clarification elaborated recommendations on inclusion and the protection of indigenous rights, calling for modes of governance that enable individual and collective rights of the indigenous population and encourage their social and political participation.

2. Incorporating a bill of rights

65. A good part of the effectiveness of bills of rights depends on the strength of the courts that interpret them and on how deeply other State powers feel bound by courts' decisions. However, introducing a bill of rights that publically enumerates the most fundamental rights a country seeks to safeguard is a powerful way of drawing a line between an abusive past and a different future, especially in the aftermath of mass violations. The design of a bill of rights and enshrining the basic principles of governance signals to institutions and individuals where minimum standards of acceptable behaviour lie. Bills of rights are a sort of a "pre-commitment" strategy that works on the basis of publicity and takes some issues out of the give-and-take of political expediency.[39]

66. In many countries with past mass violations, minorities were predominantly targeted. Articulating clear and enforceable guarantees for minorities in bills of rights may offer some protection and de-incentivize both attacks on them and the taking by them of preemptive action in ways that are characteristic of "security dilemmas".

67. Where Governments have a history of committing or condoning human rights violations, a bill of rights enables courts to identify legislation and governmental practices that have the potential to lead to recurrence of violations before they take place.

3. Security sector reform

68. Crucial elements in the area of security sector reform aiming at the prevention of violations in the future pertain to: (a) defining the different roles of the police, the military and the intelligence services; (b) strengthening civilian control over the armed forces; (c) the elimination of military "prerogatives"; and (d) the vetting of the security forces. In the light of the complexity of these areas, the Special Rapporteur has dedicated a separate report to these reform undertakings.[40]

4. Separation of powers

69. Abuses of power by security forces and lack of judicial independence are often manifestations of the same phenomenon, namely, a bloated and unrestrained executive power uninterested in accountability. Following mass violations, some

[38] See A/HRC/30/42/Add.1.

[39] See Stephen Holmes, "Precommitment and the paradox of democracy", in *Constitutionalism and Democracy* (Cambridge University Press, 1993).

[40] Report to be presented to the General Assembly at its seventieth session.

countries reconsider issues such as the separation of powers and endeavour to limit executive powers. The 2010 Constitution of Kenya, for example, curbs some of the powers given to the President by the 1963 Constitution and successive amendments, which had increased the powers of the President while weakening the legislature and the judiciary. Most recently, the authorities in Sri Lanka presented to parliament the XIX Amendment, ending the era of the so-called "executive presidency", devolving to parliament some of the powers that the office of the President had accumulated over time to the detriment of the remaining State powers.

5. Limiting the scope of military justice

70. Militaries in most countries operate their own courts because the military relies on distinct regulations, laws and codes of conduct, and the enforcement of those codes, including disciplinary procedures, requires special mechanisms. International law, however, is clear that the jurisdiction of military courts is restricted to trying members of the military for military offenses, to the exclusion of human rights violations and serious violations of international humanitarian law.[41] Trying civilians in military courts or trying members of the military for crimes other than military crimes contravenes international law. Circumventing this key principle is one of the most prevalent ways of shielding violations committed by the military from accountability.

6. Establishing a constitutional court

71. Many transitioning countries, including virtually all the countries in the "third wave" of democratization,[42] have introduced a separate constitutional court, largely following the lead of Germany after the Second World War.[43] The establishment of such courts distinguishes the adjudication of routine, ordinary matters from crucial decisions on fundamental rights. This distinction provides an elegant way out of a dilemma faced by countries that do not trust judges appointed by a predecessor regime to be the last arbiters of the most fundamental rights-related questions, but that cannot afford to vet the judiciary.

72. There is no court, however, that can be entirely responsible for the protection of rights if other branches of power are determined to commit violations, or if non-State actors are determined to commit abuses. Similarly, no court, on its own, can sustain the rule of law in the face of attacks from other powers or indifference from citizens.[44] Membership in constitutional courts can be manipulated, judges coerced[45] or corrupted, and new ways of subverting legal order, which constitutional courts were not designed to counter, have emerged.[46]

73. Notably, for a constitutional court to be effective in protecting individuals' rights and preventing violations, it needs to be vested with an individual complaints

---

[41] See Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 29.

[42] See Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1993).

[43] See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015).

[44] See Bojan Bugaric, "A crisis of constitutional democracy in post-Communist Europe: 'Lands in-between' democracy and authoritarianism", *International Journal of Constitutional Law*, vol. 13, Iss. 1, pp. 219-245 (2015).

[45] See, for example, the recent allegations against one member of the Burundi Constitutional Court.

[46] See David Landau, "Abusive Constitutionalism", *UC David Law Review* (2013).

procedure, whereby an individual can challenge the infringement of his or her rights by any public act or omission.

7. Adopting a new constitution

74. Many countries are tempted to adopt a new constitution immediately after a transition. Some countries have succeeded in such an effort, including Spain in 1978 and, more recently, Kenya in 2010 and Tunisia in 2014, in a display of maturity and self-restraint on the part of Assembly members that did the country proud. There can hardly be a more powerful way to mark a line between the present and the past and to introduce guarantees and protections that were missing or ineffective before. Provided the country can complete the constitution-making exercise and that the new provisions are in fact observed, a new constitution enshrining a bill of rights and principles of governance is likely to be the central part of a non-recurrence policy.

75. However, constitutions are, regretfully, more often breached than observed. It might be that engaging in the far-reaching "existential" questions characteristic of constitutional debates proves to be a distraction in the early days of a transition, in a context in which State institutions might be required to urgently establish their capacity to meet more immediate needs. The first phase of a transition might not be the most conducive context for guaranteeing that the constitution will indeed be inclusive enough; it may be that political actors are insufficiently representative or that, in the absence of previous opportunities in countries lacking the required political traditions, actors at the table on the cusp of the transition are insufficiently versed in the complicated type of judgement that is called for if a sufficiently inclusive, sustainable constitution is to be articulated. Some of these factors might invite participants in constitutional debates to adopt a zero-sum attitude thinking that this is their (only) chance. All of these elements put obstacles in the process expected to produce a foundation that is good for all and for a long time.

76. Therefore, it may be advisable for countries to expand their repertoire of options for constitutional reform to include, for instance, the adoption of transitional or interim constitutional arrangements, as South Africa did, or incremental processes of constitutional renewal, as in Hungary and Poland after 1989.[47] More gradual processes of constitution-making are likely to lower the stakes for all stakeholders. This might open the possibility of achieving a greater degree of consensus over issues of critical importance.

V. Societal interventions

77. Prevention is not merely a matter of making changes in texts; prevention calls for changes in practice. Hence, legal reforms need to be accompanied by initiatives that can change "factor endowments", including available resources and, importantly, human capacity.

78. Most discussions of guarantees of non-recurrence have focused on the reform of official State institutions. However, in contexts of past mass violations, State institutions are often weak, inefficient and/or corrupt. Even if they are honest and relatively competent, they may have very limited reach, as in some countries the majority of conflicts are settled through informal mechanisms.

[47] See Vicki C. Jackson, "What's in a Name? Reflections on Timing, Naming and Constitution-Making", *William and Mary Law Review*, vol. 49, iss. 4 (2008).

79. The contribution of civil society organizations to transitional processes has been analysed is various ways, including regarding their advocacy function, their crucial role in collecting and preserving evidence, their monitoring functions and their reconciliation initiatives. All of these are crucial. However, in the present report, the Special Rapporteur concentrates on a more prevention-specific argument. He presents a series of initiatives that may enhance the preventive potential of civil society, ordered by degree of ambitiousness and complexity, showing how this potential, in many ways, is a manifestation of a "power of aggregation" that counteracts the "disarticulating power" of terror and that works by lowering the costs of raising claims.

A. Ceasing attacks and threats and removing obstacles

80. One of the simplest ways of enabling civil society to contribute to preventive work is simply to refrain from persecuting, intimidating and harassing civil society representatives, including human rights defenders.[48]

81. Another step is to remove many of the legal and practical barriers that have been placed on civil society with increased frequency in the recent past. According to one report, "between 2004 and 2010, more than 50 countries considered or enacted measures restricting civil society. Since 2012, more than 90 laws constraining the freedoms of association or assembly have been proposed or enacted."[49] These laws introduce obstacles of various types, such as barriers to operational activity, free speech and advocacy, contact and communication, peaceful assembly and access to funding.

82. Such strong governmental interest in hampering the work of civil society confirms yet again the importance of the latter. This consolation, however, does not make up for the different kinds of risks and privations that these obstacles generate, including violations of the right to physical integrity and the weakening of monitoring and advocacy capacities to prevent violations.

B. Legal empowerment

83. A more proactive way of strengthening civil society is to establish programmes targeted at the community level, focusing on those who have traditionally been excluded from the protection of the law, particularly women, with the specific aim of facilitating the use of the law, the legal system and legal services to advance their own rights, promote government accountability and resolve local disputes.

84. Legal empowerment can contribute to restoring the sense of agency of control over one's life that mass violations erode. These initiatives have also acted as a catalyst for social organizations and led to the enhanced ability, confidence and willingness of individuals and communities to participate in sociopolitical processes, including transitional justice mechanisms. This empowerment typically also brings with it a more assertive attitude of civil society actors to prevent violations in the future by enforcing their rights more confidently.

[48] See A/HRC/25/55.

[49] See Douglas Rutzen, "Aid barriers and the rise of philanthropic protectionism", *International Journal of Not-for-Profit Law*, vol. 17, no. 1, p. 7 (March 2015).

C. Creating enabling environments

85. In the present report, the Special Rapporteur encourages further reflection and study on the ways in which the strengthening of civil society can contribute to prevention. In earlier reports, observations were made about the fact that, without civil society participation, little progress would have been made in the domains of truth, justice and reparations. It is overwhelmingly thanks to the unrelenting advocacy of civil society organizations that accountability remains on the political agenda in countries with past mass violations. It is difficult to think of the efforts of Argentina to achieve justice without the contribution of the organizations Madres de la Plaza de Mayo and the centre for legal and social studies (CELS); those of Chile without the contribution of the Vicaría de la Solidaridad; or those of Guatemala without the persistence of the centre for human rights legal action (CALDH), to name only a few examples.

86. Because "civil society" should not be reduced to "non-governmental organizations", it is important to recall that, in all transitional processes, a variety of stakeholders, including trade unions and religious organizations, have made essential contributions. To illustrate, although the role of the Catholic Church during the dictatorships in Argentina and Spain and during the genocide in Rwanda has been questioned, its contributions to the search for accountability in Chile, Uruguay and to this day in Burundi are notable. Similarly, trade unions have made crucial contributions to many transitional processes, including in South Africa, Poland and, recently, in Tunisia.

87. Because most transitional processes have been "liberalizing" and therefore, over time, both trade union and church affiliations decline, the contribution of these groups tends to be overlooked. In the present report, the Special Rapporteur emphasizes the significance of their contribution not only for the sake of historical accuracy, but also because it gives an important indication about the type of civil society that we should aim at if we are interested in prevention.

88. Authoritarianism has not disappeared as a threat to human rights, and other threats have been added. Despite significant differences among them, systematic threats to rights share a common element: violence or threats of violence undermine civic trust, a phenomenon that creates a negative feedback loop and becomes both a condition and a consequence of the continuation of violence.

89. Hence the importance of strengthening civil society. In past reports, more concerned with issues of redress, the point to emphasize was that a strong civil society diminishes the costs and risks of raising claims, both for individuals and groups. In the context of a discussion about prevention, the point to emphasize is that in a strong civil society, in which individuals and groups are empowered to exercise their rights, the violation of rights is less likely.

90. Because civil society cannot be reduced to formal institutions, it would be a mistake to conceive the project of strengthening civil society on the model of an institutional reform process. Civil society by its very nature is not part of the State and therefore does not respond to State initiatives as if it were.

91. The strengthening and enhancing of the preventive potential of civil society are likely to come from such contributing factors as (a) the active promotion of the fundamental freedoms of expression and opinion, of peaceful assembly and association and of religion; (b) the establishment of an education system that provides opportunities to develop not just marketable skills but critical thinking; and (c) the preservation of traditions of openness, transparency and consultation, more

than from the mere removal of obstacles to the operation of non-governmental organizations.

VI. Interventions in the cultural and the individual spheres

92. In addition to interventions in the domains of official State institutions and in civil society, those in the domain of culture and individual spheres are required for long-lasting transformations, including non-recurrence. Culture and personality structures are, generally speaking, sources of stability and continuity in social relations, hence, neither one is open to direct and immediate change by legal fiat. However, this does not imply that they are immune to any change.

A. Education

93. In transitional contexts, education has the potential to act as a powerful tool for non-recurrence. Because of its formative potential, education can contribute to shaping new norms, mediating between contending narratives of the past and nurturing a culture of dialogue and democratic citizenship across generations. A transitional justice approach to education can greatly contribute to contextualizing the aims of educational reform after conflict and/or repression, with an eye to strengthening its potential for preventing the recurrence of violations, for example, by identifying the patterns that fuelled conflict, especially in relation to exclusionary and authoritarian practices in school systems.[50]

94. Of significant relevance is the teaching of history: if approached as a system of research rather than a mechanism for simply preserving and remembering data, it can train citizens in habits of analysis and critical reasoning.[51] In transitional contexts, historical facts are often manipulated to serve political and ideological aims through the propagation of one-sided narratives that leave no room for alternative perspectives. Different groups in society, particularly in ethnically divided ones, may learn different versions of a shared history that clash significantly with each other.[52] Similarly, the suppression of historical events, as practised in some contexts, reinforces the social identities of those who fought against each other.[53] Such practices risk perpetuating divisions and conflicts rather than preventing their recurrence.

B. Arts and culture

95. Cultural interventions, such as museums, exhibitions, monuments and theatre performances, have the capacity to affect not only victims but also the population at large.[54] In addition to the capacity to engage empathy, there are artistic and cultural interventions that are ideally suited to "make visible" both victims and the effects of

---

[50] See Clara Ramírez Barat and Roger Duthie, *Education and Transitional Justice. Opportunities and Challenges for Peace Building* (International Centre for Transitional Justice and UNICEF, forthcoming).

[51] See A/HRC/27/56/Add.1, para. 34.

[52] See A/68/296.

[53] See Harvey M. Weinstein et al., "School voices: challenges facing education systems after identity-based conflicts", *Education, Citizenship and Social Justice*, vol. 2 no. 1, p. 66 (March 2007).

[54] See A/HRC/25/49.

victimization, to account for the very complex ways in which violations affect the lives of individuals and of communities, especially over time. Furthermore, some artistic media provide space for victims to articulate their experiences and even, emphasizing the interventions' enabling potential, to try out new identities, including the identity of a rights claimant.

C. Archives

96. Archives containing records of mass violations can contribute to prevention. Access to well-preserved and protected archives is an educational tool against denial and revisionism, ensuring that future generations have access to primary sources, which is of direct relevance to history teaching. One notable example in this regard are the Stasi files opened up by Germany after 1989. Opening files contributes directly to the process of societal reform.

97. However, there is a lack of consistency in the disposition of archives of transitional justice mechanisms, including truth commissions.[55] To address this gap, as a first step and as a result of a series of consultations with experts, the Special Rapporteur developed a set of general recommendations that builds on the right to know. This set of general recommendations (see annex) is meant to provide guidance for truth commissions and other relevant stakeholders in their future archival work.

D. Trauma counselling and psychosocial support

98. Psychosocial support or trauma counselling has been rather marginally identified as a component of a comprehensive strategy of non-recurrence. Gross violations are likely to lead to health problems,[56] implying troubles for individuals and society, which call for adjustments on a more fundamental psychological level. Challenges may include identity problems for individuals and society, which hamper the transformation of societies. Moreover, unaddressed specific traumatic events may lock countries in repeated cycles of violence.

99. Post-authoritarian and/or post-conflict settings face low levels of trust both vertically — between the State and its people — and horizontally — between individuals and between communities. However, trust is the foundation for the development of a rule of law culture, an environment that fosters reconciliation and a necessary precondition for effective communication between the victims and the authorities, as well as within society.

100. Where structural abuse or recurrent patterns of violence and unresolved trauma intersect, high levels of conflict and further violence are likely to develop. Furthermore, amid high levels of inequality, poverty and unemployment, where people's sense of dignity and self-worth are severely compromised on a daily basis, violent behaviour can become a simple means of taking back the control people are denied in their life.

101. Trauma counselling can be used to overcome and transform victim/perpetrator identities, as an important step towards reaching a conclusion. For the victim, this

[55] Ibid.

[56] For example, for Peru, see Lisa J. Laplante, "Linking Peacebuilding and health in post-conflict settings", available from www.frient.de/publikationen/dokumente/library/linking-peacebuilding-and-health-in-post-conflict-settings.html

can mean once more taking part fully in society; for the perpetrator, it can mean acknowledging and assuming responsibility. This transformation can help to avoid cycles whereby "victims become perpetrators", which perpetuate cycles of mass violations.[57]

102. While arguing for the anchoring of trauma counselling as a crucial element of a State policy aimed at guaranteeing non-recurrence, the Special Rapporteur warns against using psychosocial support to "water down" the importance of institutional reform. Instead, trauma counselling and civil society efforts should be considered as a "trigger-down mechanism" to ensure that institutional reform becomes truly effective at the individual level.

VII. Observations and recommendations

103. **The Special Rapporteur calls for more focused attention to the challenges arising in areas of weak governance for the effective satisfaction of rights and in particular to the challenges for protecting the rights of marginalized groups and individuals. Significantly more work needs to be done normatively and practically in order to protect the rights of individuals in such situations, including civilians trapped in the cross-fire of a conflict.**

Institutional level

104. **The Special Rapporteur calls upon States to take the necessary measures, in the aftermath of conflict and/or repression, to enable the registration of births and give access to all to gain or regain their legal identity; and to increase access to registration mechanisms, including through mobile registration units, accessible at the local and community levels, with simplified procedures that are reflective of the circumstances people face, for instance after displacement and the fragmentation of families. Measures need to be taken to ensure access for all, without discrimination, to a fully functional civil registration system that is universal, compulsory, permanent, continuous and cost-free, that ensures the confidentiality of personal data and is culturally sensitive, especially in relation to religious or cultural circumstances regarding minorities and indigenous groups.**

105. **He also calls upon States to adopt a non-recurrence policy that should include the ratification of relevant treaties, avoiding or withdrawing reservations that may defeat the purpose of the treaty. Ratification should be followed by a strategy for incorporating the provisions effectively into domestic law and their implementation. States should consider prioritizing the ratification of targeted treaties that pertain to gross human rights violations and serious violations of international humanitarian law, including torture, sexual and gender-based violence, extrajudicial executions, arbitrary detentions, enforced disappearances, institutionalized discrimination, forced displacement and exile, and crimes amounting to crimes against humanity, war crimes and**

[57] See S. Servaes and N. Birtsch, "Engaging with victims and perpetrators in transitional justice and peace building processes", workshop report published by Working Group on Development and Peace (FriEnt) and the Centre for Peacebuilding (KOFF) (October 2008). Available from www.frient.de/nc/en/publications-service/documents/library/engaging-with-victims-and-perpetrators-in-transitional-justice-and-peace-building-processes.html.

genocide. The Special Rapporteur urges all States to ratify the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

106. States should promote reforms to ensure full compliance of emergency, security or anti-terrorism legislation with international human rights standards. Reforms should include explicit reference to non-derogable rights and enshrine elements for suitability, necessity and proportionality tests. Legislation must be in conformity with international standards, in particular the principle of legality, due process and fair trial. Furthermore, the criminalization of terrorist activity must be formulated in explicit and precise terms that enable individuals to regulate their behaviour, and the definitions of terrorist crimes should be confined exclusively to activities that entail or are directly related to the use of deadly or serious violence against civilians.

107. States should also consider methods of vetting judicial personnel that are compatible with the separation of powers, the independence of the judiciary and due-process guarantees. A judiciary that is not trusted by citizens either for reasons of complicity or ineffectiveness will find it impossible to fulfil its corrective and preventive roles. Since self-reflection about the judiciary's own role in violations is both trust-inducing and potentially preventive, the training of judicial personnel, and judicial reform in itself, should address the judiciary's role in past violations.

108. The Special Rapporteur calls upon States to include in their policies initiatives geared towards strengthening internal (individual) and external (institutional) judicial independence. He urges them to ensure that their judicial systems comply with relevant standards, including the Basic Principles on the Independence of the Judiciary. Judiciaries can crucially help to prevent violations by checking executive powers and by adjudicating conflicts impartially and independently.

109. He also calls upon States to endow their judiciaries with specialized competencies required to address mass atrocities strategically to dismantle networks of criminality. Implementing such strategies is one of the most significant contributions judiciaries can make to the prevention of violations. Similarly, he urges them to acquire competencies in the detection and prevention of other gross violations, which are routine in many places, including torture. While specialized judicial capacities are sometimes best expressed through the creation of specialized entities, no special jurisdiction — military or not — should weaken the power to guarantee and enforce basic rights.

110. States should consider, in transitional contexts, constitutional amendments or reforms to lay down a catalogue of rights and structures of governance as the foundation of the "new" State. This is possible through an incremental, interim or fully fledged constitutional drafting process. Enshrining the principles of the separation of powers, the independence of the judiciary, the non-partisan role of the security forces and a bill of rights is indicative of a new beginning. Special attention should be paid to providing for oversight, accountability and strong human rights protection mechanisms, including through the establishment of a constitutional court or chamber with an individual complaints procedure.

111. The jurisdiction of military tribunals should be limited solely to military personnel charged exclusively with military offences, to the exclusion of human rights violations and serious violations of international humanitarian law.

Civil Society

112. The Special Rapporteur calls upon States to prevent any persecution, attacks, threats, intimidation and harassment of civil society representatives. States should ensure protection mechanisms for civil society at risk, including early warning systems, physical protection measures, as well as accountability and prompt and impartial investigations in cases of violations. This requires clear and decisive messages from the highest authorities on zero-tolerance policy for such attacks and intimidation against civil society actors and on public recognition of their essential role in building just, inclusive and tolerant democracies.

113. He also calls upon States to withdraw or reform provisions that impose an excessive burden or disproportional heavy bureaucratic and costly procedures, which severely hamper civil society participation. This includes (a) amending registration mechanisms thereby excluding the possibility to deny registration on vague grounds; (b) reforming excessive procedural requirements; (c) withdrawing prior-authorization requirements, allowing spontaneous peaceful assembly and, if prior-notification mechanisms exist, their rationale should be grounded by ensuring the exercise of the right to peaceful assembly, protection of public safety and order, and the rights and freedoms of others; (d) providing for precise regulations defining illegal activities; (e) preventing arbitrary interpretation of regulatory provisions; (f) reforming legislation that prevents organizations from receiving support from certain donors, including foreign funding; (g) reforming legislation that imposes undue restrictions on freedom of expression and criminalizes dissenting and critical opinions; (h) preventing arbitrary or unlawful surveillance; (i) ensuring effective access to encryption and anonymity tools in online communications; and (j) protecting the confidentiality of sources.

114. States should create the economic, political, legal, social and cultural conditions that actively support the ability and capacity of persons, individually or in association, to engage in social and civil activities, promoting the principles of participation, non-discrimination, dignity, transparency and accountability. Key conditions include: (a) a conducive political and public environment, through a supportive legal and practical regulatory framework in line with international human rights standards; (b) access to international and regional human rights mechanisms and effective cooperation with independent national human rights institutions; (c) access to information; (d) special measures and resources targeting the most marginalized groups to ensure their integration and participation and the consideration of their voice among civil society actors; (e) opportunities for civil society to participate in decision-making processes; and (f) the provision of financial resources and stability, including through public subsidies.

115. States should also support legal empowerment programmes, ensuring their broad participation among a sufficiently large section of the population and their long-term impact, in order to have a transformative effect on attitudes and behaviour. This may include: (a) building partnerships among various actors, including (international) donors, government focal points and community leaders; (b) sustained financial and capacity support; and (c) the creation of mutually reinforcing networks among individuals and groups at the local, national and international levels.

Cultural and the individual spheres

116. The Special Rapporteur calls upon States to conceive educational reforms, cultural interventions, including memorialization, and archives as part of their non-recurrence policies. He urges States to focus more attention on these areas, and intends to pay more attention to them in the future, in cooperation with other special procedures.

117. He also calls upon States to consider the annexed set of general recommendations for truth commissions and archives as an important component of the work of the Human Rights Council on transitional justice.

118. States should ensure that history teaching aims at fostering critical thought, analytic learning and debate, in order to enable a comparative and multi-perspective approach, as well as a better understanding of the contemporary challenges of exclusion and violence.

119. States should also ensure that psychosocial support and trauma counselling are addressed as core components of transitional justice, emphasizing their central importance for repairing the social contract — i.e., the relationship between the State and the individual — and social cohesion — i.e., relationships of individuals with one another — after periods of protracted violence and/or oppression. The Special Rapporteur underscores that these twin goals are essential to offering victims and society the highest possible guarantees available that violations will not reoccur.

120. The Special Rapporteur calls upon States to build a sustainable culture of non-recurrence by ensuring that trauma counselling in transitional contexts not only focuses on assisting individuals and families with "daily problems", but also includes interventions to build on and strengthen the resilience and coping mechanisms of the communities and society at large. In this connection, trauma work should be linked to educational reform and education itself, for children, adolescents and adults.

121. He also calls upon States to develop further work on and support for psychosocial initiatives, both to relieve the immense suffering of victims and to help to put an end to cycles of violence. He highlights that to think that the burden of prevention can be carried by punitive measures alone is both to overestimate the capacities of criminal justice systems and to underestimate the importance of other types of intervention.

Annex

[English only]

Set of general recommendations for truth commissions and archives

Introduction

1. Many post-authoritarian and post-conflict societies are faced with enormous challenges in the preservation and disposition of records containing information on gross human rights violations and serious violations of international humanitarian law. In many cases, secrecy, national security concerns, and poor archival practice stand in the way of guaranteeing the right to know the truth.

2. Archivists have, over time, developed sophisticated technical expertise and knowledge on all relevant issues regarding archives, including preservation, accessibility, and management. However, there is a striking gap between technical archival expertise and practice. Policies and practices that fall short of international standards risk the loss of records containing an important part of a society's heritage and hence hamper the possibility of accessing documentary evidence and support for efforts to achieve truth and justice.

3. Indeed, archives are relevant and can make significant contributions to each of the pillars of transitional justice, not merely truth and justice. At the same time, transitional justice measures can contribute to a country's archival system. Beyond the fact that transitional justice measures generate records themselves, truth commissions, trials, reparations programs and other transitional justice initiatives can contribute to improving archival practice both by the way they implement relevant standards with respect to their own documents, and because some of them, particularly truth commissions, are in a good position to make comments and recommendations about archival reform in general.

4. That potential, however, has not been consistently realized. Even truth commissions, both in post-authoritarian and post-conflict settings, manifest a significant gap between expertise and actual practice. There is little consistency in the disposition of truth commission archives, in the regimes that govern subsequent access to them, and in the recommendations that truth commissions make concerning archival systems.

5. In the conviction that these gaps need to be addressed, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in his 2013 report to UN Human Rights Council on truth commissions (A/HRC/24/42) "calls for the development of international standards on archiving" for truth commissions. What follows is intended to contribute to the development of such standards. Part I contains recommendations *for* truth commissions pertaining to their own operations and the disposition of their archives, and Part II comprises recommendations that truth commissions *can make* regarding the establishment of national archival policies concerning

records that contain information about gross human rights violations and serious violations of international humanitarian law.[a]

6. As a general point, the Special Rapporteur would like to take the opportunity to reiterate the call on States to provide full support to truth-seeking mechanisms throughout their whole life-cycle, which includes access to records containing information on gross human rights violations and serious violations of international humanitarian law, in order for them to be able to effectively and independently implement their mandate.

I. Recommendations for truth commissions

In the context of their operations, truth commissions are encouraged to:

7. *Build* provisions for the eventual disposition of their records, guaranteeing both their safety and accessibility. This needs to be done in the early stages of planning their operations: a commission needs to decide who will be responsible for managing the records, where they will be stored in the short and long term, and how access to them will be controlled;

8. *Engage* archival expertise in making and implementing those provisions during the life of the truth commission, and in this context take advantage of national (National Archives and Archival Associations) and international assistance and advice (e.g. International Council on Archives, Archivists without Borders);

9. *Plan* to deposit their archives in the country where the violations occurred and the commission operates, preferably in existing national archives, duly taking into account considerations of the security, integrity and accessibility of the archives. New and specialized archives may need to be created until such time as the national archives are able to adequately handle records of truth commissions. In the event of the possible loss, mutilation, poor preservation or destruction of the records in the country of origin, truth commissions should keep a complete, scanned and/or digitalized copy of the records in a secure facility outside the country or consider temporary preservation in a secure repository in a second jurisdiction or with an international institution;

10. *Consider* criteria having to do with preservation, accessibility, and trustworthiness of the host institution in deciding on the adequate repository.[b]

11. *Stipulate* that the access policy of truth commission archives should maximize public accessibility, while respecting applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony. Access to truth commission archives may not be denied on grounds of national security or other grounds unless the restriction is in full compliance with international human rights law;

12. *Note* that maximizing future accessibility has an impact on many operations of a commission throughout its lifetime, including, for example, on the process of taking statements and other contact with victims and witnesses who should be advised that their

[a] Both sets of recommendations build on well-established definitions on the "right to know" and on "archives" as stipulated in, among other places, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity; see report of the independent expert Diane Orentlicher to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005.

[b] For example, ISO 16363 defines a practice for assessing the trustworthiness of digital repositories.

contributions to the commissions may be accessible in the future under specified conditions;

13. *Establish* guidelines for access to truth commission records, which shall take into account:

(a) General access rules, such as what was previously public should remain public; victims, families, investigative and prosecutorial authorities, as well as legal defense teams, should have unhindered access to information on their specific case; there should be a presumption of public access to all State information with only limited exceptions; a procedure to make effective the right of access should be established; whatever access rules are determined for various categories of potential users (for example, victims, legal representatives, journalists, academics, and members of the general public) should apply to all members of the given category without discrimination;

(b) Categorization of records enabling familiar distinctions between types of documents (e.g. reports of own investigations, records of own meetings, victims' testimonies, documents obtained from other institutions, organizations, or private persons etc.) that will allow for a differentiated approach in facilitating access, in accordance with general access rules, to each type of document/collection;

(c) The need for effective mechanisms of reference services, as well as new technological advances in managing archives;

14. *Develop*, with the support of national and international expertise and assistance, provisions and measures to secure and preserve national archives, including by building effective and sustainable record management and archival systems, which includes, i.a., secure and adequate premises and clear appraisal policies;

15. *Elaborate* policies concerning relevant records and archives of non-State actors, including private businesses, so as to maximize effective management and access of these records by the truth commission.

II. Possible recommendations by truth commissions

16. Regarding their recommendations on archives and the establishment of national archival policies that concern records containing information on gross human rights violations and serious violations of international humanitarian law, truth commissions are encouraged to:

17. *Address* the issue of reform of national archival legislation and institutions to encourage the establishment of modern, accessible, and reliable archives which are essential for the long-term preservation and use of records containing information on gross human rights violations and serious violations of international humanitarian law. Recommendations should include that reform efforts ought to be conducted with the participation of public institutions, civil society, and archival experts;

18. *Make* recommendations to preserve and actively use national archives, including archives of security services;

19. *Call for* independent oversight over the archives, including of archives of formerly repressive regimes;

20. *Recommend* the creation of archival laws, freedom of information legislation, data protection legislation and transparency requirements within other laws, which take into account the right to information, the right to know the truth, and the specificity of the records dealing with human rights violations and violations of international humanitarian law;

21. *Recommend* to the responsible authorities that they increase the capacity and where necessary the resources of State and local archival actors;

22. *Recommend* the provision by the State of information to the public on legal and practical requirements for access to archives;

23. *Promote* the establishment of comprehensive National Archival systems, including non-governmental records, especially those that are relevant to gross human rights violations and serious violations of international humanitarian law. Improvements in the regulation, disposition, protection and access to non-governmental archives (which does not involve the centralization of *all* records) will contribute to the establishment of such comprehensive systems, in accordance with international standards;

24. *Recommend* to the responsible authorities that they facilitate the work of civil society in the area of archives and ensure an enabling environment in this respect, in accordance with international standards;

25. *Reiterate* that access to archives, containing records with information on gross human rights violations and serious violations of international humanitarian law, may not be denied to the public on grounds of national security unless the restriction is in full compliance with international human rights law.

United Nations A/HRC/30/42/Add.1

General Assembly

Distr.: General
10 August 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff

Addendum

Mission to Burundi (8–16 December 2014)*

Summary

Since the signing of the Arusha Agreement, and in particular the adoption of the 2005 Constitution, which institutionalizes the power-sharing arrangement, Burundi had made significant strides to end and overcome conflict up to April 2015. Massive demobilization and reintegration efforts, combined with agreed ethnic representation in all official institutions, including the security sector, had further enabled the country to ensure a degree of stability since 2009. If Burundi had maintained its commitment to the path it had followed since the signing of the Arusha Agreement up to the end of April 2015, the challenge ahead would be not only one of staying the course, but of accelerating the pace of transition to a rule of law-based society. Serious efforts to redress past massive violations are required to demonstrate the authorities' commitment to break with the tradition of impunity, which, in turn, would enable domestic institutions and mechanisms to effectively protect human rights in the present. Transitional justice initiatives need to be intentionally grounded in and foster human rights. They must not be used as instruments of "turn-taking" that benefit only one side.

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission and French only.

GE.15-13579(E)

Please recycle

The independence of the recently established Truth and Reconciliation Commission will be central to its gaining credibility and the trust of the population and victims. The risk of the Commission turning into a "pardon commission" should be taken seriously. Individual pardon agreements do not constitute an effective and comprehensive response to violations of the fundamental principle of the rule of law that have resulted from massive individual violations. As important as a well-functioning truth commission is, the other pillars of transitional justice must not be relegated to the back burner, as has happened in Burundi over the past 10 years.

It is of grave concern that discussions regarding criminal justice for massive violations have come to a halt; they must not be further postponed. The significantly expanded "temporary" immunities regime has become an obstacle to all justice initiatives.

Reparation initiatives have focused mainly on the restitution of land. The independent and impartial functioning of the National Commission on Land and Other Assets and the newly established Special Court are central pillars in ensuring that land issues are settled without consideration for political, ethnic or other affiliation. Broader land reform initiatives, including efforts to ensure women's access to land, need to be undertaken. Comprehensive and feasible reparation schemes need systematic treatment, with special attention to the needs of the most vulnerable and based on a consultative process.

Commendable achievements in the area of demobilization, disarmament and reintegration had been made as at the end of April 2015. However, continuing reform efforts in the security sector must be linked with justice considerations to ensure an institutional set-up that contributes to preventing future violations. While there is broad acknowledgement that reforms are required to establish an independent judiciary, the executive branch and the governing political party continue to tightly control the justice sector.

Burundian society still suffers the effects of the intergenerational transmission of violence. Historical narratives that replicate old divisions and reproduce fear are transferred at the family and community levels. The absence of efforts to teach the country's recent history with a view to fostering dialogue, coupled with the scarcity of officially supported (not controlled) memorial and remembrance processes, as well as a disregard for mass burial places, contribute to the replication of divisive stories.

Annex

[English and French only]

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, on his mission to Burundi (8–16 December 2014)

Contents

		Page
I.	Introduction	4
II.	Context of the visit	4
	A. Political context	4
	B. General considerations	6
III.	Truth and Reconciliation Commission	7
	A. Context	7
	B. Mandate, composition and structure	7
	C. Potential challenges in the functioning of the Commission	7
IV.	Delay in justice initiatives	10
	A. Stalemate in the creation of a specialized justice mechanism	11
	B. "Temporary" immunities	11
	C. Is the Truth and Reconciliation Commission further delaying justice?	12
V.	Broader reparation efforts required	12
	A. Land restitution	12
	B. Need for broader land reform and land access for women	14
	C. Comprehensive reparation programme	14
	D. Immediate assistance programmes for victims	15
VI.	Institutional reforms crucial to guaranteeing non-recurrence	15
	A. Security sector reform	15
	B. Justice system reform	18
	C. Access to justice and legal empowerment	18
	D. Education, memorialization and archives	19
VII.	Observations and recommendations	20
	A. Observations	20
	B. Recommendations	22

I. Introduction

1. Pursuant to Human Rights Council resolution 27/3, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, visited Burundi from 8 to 16 December 2014, at the invitation of the Government.

2. The purpose of the visit was to objectively and impartially assess the work undertaken by the Government in the areas of truth, justice, reparation and guarantees of non-recurrence, and to advise the authorities and Burundian society in their efforts to adequately address past violations in the process of transitioning to an order based on the rule of law.

3. During his visit, the Special Rapporteur met with the First Vice-President of the Republic and the Ministers of Foreign Affairs; National Solidarity, Human Rights and Gender; Justice; Finance; the Interior; and National Defence and War Veterans. He also met with the National Permanent Commission on the fight against the proliferation of smalls arms and light weapons and the Commission for Justice and Human Rights of the National Assembly. He held meetings with the Chief Justice of the Supreme Court, the Special Court on Land and Other Assets, the President of the National Commission on Land and Other Assets, the Chair of the independent National Human Rights Commission and the Chair of the former tripartite committee in charge of national consultations. The Special Rapporteur also met with the newly appointed Chair of the Truth and Reconciliation Commission. In Bujumbura, he met with religious leaders, representatives of political parties, the Special Representative of the Secretary-General and Head of the United Nations Office in Burundi, representatives of United Nations agencies and members of the diplomatic corps. During his visit, the Special Rapporteur met with representatives of civil society and travelled to meet with victims of the massive violations that occurred in Bugendana, Gatumba, Itaba, Kibimba, Kimina and Nyambeho. He thanks all those who shared their valuable and important experiences and insights.

4. The Special Rapporteur thanks the Government of Burundi for its invitation and cooperation, and expresses his appreciation to the Human Rights and Justice Section of the United Nations Office in Burundi for its support.

II. Context of the visit

A. Political context

5. Since gaining independence in 1962, Burundi has experienced cycles of violence, often ethnically motivated, on a massive scale, leading to gross human rights violations and serious violations of international humanitarian law. Those violations remained largely unaddressed and unleashed the intergenerational transmission of violence over decades. Watershed moments include events in 1965, 1972, 1988, 1991 and 1993, and the subsequent civil war. The 2000 Arusha Peace and Reconciliation Agreement for Burundi (Arusha Agreement), together with subsequent agreements with the two main rebel movements, the National Council for the Defence of Democracy–Forces for the Defence of Democracy, in 2003, and the Party for the Liberation of the Hutu People–National Forces for Liberation, in 2006, and the 2005 Constitution established the framework for a higher degree of peace and stability than that known in the country since independence and for a significant transformation in intercommunity relationships.

6. Burundi arguably has the most complex consociational arrangement in the world. As with all such arrangements, it seeks to reconcile majority claims with minority rights, in

this case, through a finely tuned set of arrangements that combine proportionality with minority overrepresentation. The President of the Republic must be assisted by two Vice-Presidents, one Hutu and one Tutsi. All government positions must be split 60/40 between Hutus and Tutsis, with the same proportion for representation in the National Assembly, if necessary by means of a cooptation mechanism. The Senate, like the armed forces, is split 50/50 between Hutus and Tutsis, and regional balances are also mandated. The arrangement is not simply a power-sharing agreement, but also stipulates that political parties must be ethnically and regionally integrated, and supermajority requirements (a two-thirds quorum for legislative action; a minimum of two thirds of votes for a law to be adopted) further protect minority rights and create incentives for de-ethnicizing politics.[1]

7. The Arusha Agreement proposed measures to combat impunity, including the establishment of the National Truth and Reconciliation Commission and the International Judicial Commission of Inquiry. Furthermore, it provided for the Government to request the Security Council to establish an international criminal tribunal should the findings of the Commission of Inquiry report point to the existence of acts of genocide, war crimes and other crimes against humanity.

8. National consultations on transitional justice were undertaken in 2009, with the objective of eliciting views on how to come to terms with the legacy of massive violations and end impunity with the ultimate aim of promoting national reconciliation.[2]

9. The Truth and Reconciliation Commission was established, and its members appointed in December 2014, that is, 14 years after the signing of the Arusha Agreement. Simultaneously, the United Nations Office in Burundi completed its Security Council mandate and transferred its responsibilities to the United Nations country team.

10. At the time of the Special Rapporteur's visit, political campaign activities for the 2015 elections had already started. During various meetings, concern was expressed about different aspects of the upcoming political process, including whether the incumbent President would run again and the constitutionality of that option; the guarantees to parties that they could run their campaigns freely and without restrictions; the effectiveness and impartiality of the electoral process; and, most seriously, the threat posed by the youth militias, in particular the *Imbonerakure*, which openly supported the current Government.

11. By the end of April 2015, national and international observers had expressed alarm at the situation in Burundi. The decision of the ruling party to have the incumbent President, Pierre Nkurunziza, run for a third term unleashed protests that were met with a wave of killings, arbitrary arrests and intimidation by the police.[3] Rising hate speech, together with severe limitations to the freedoms of expression and peaceful assembly were deeply concerning.

---

[1] The arrangement is made more complex by integrating members of government and rebel movements. See René Lemarchand, "Consociationalism and power sharing in Africa: Rwanda, Burundi and the Democratic Republic of the Congo", *African Affairs*, vol. 106, No. 422 (January 2007); Stef Vandeginste, *Stones Left Unturned: Law and Transitional Justice in Burundi* (Antwerp, Belgium, Intersentia, 2010).

[2] Office of the United Nations High Commissioner for Human Rights (OHCHR), Rapport des consultations nationales sur la mise en place des mecanismes de justice de transition au Burundi (Bujumbura, April 2010), p. 11. Available from www.ohchr.org/Documents/Countries/BI/RapportConsultationsBurundi.pdf.

[3] See OHCHR, "Pre-election violence endangers Burundi's young democracy, UN rights experts warn" press release (30 April 2015). Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15909&LangID=E.

B. General considerations

12. The Special Rapporteur has three overall considerations in mind. First, the Arusha Agreement took a broad approach to past violations and made reference to truth and justice mechanisms and institutional reforms. However, discussions at the domestic level, as well as with international actors over the past decade, have focused mainly on the establishment of a truth commission, relegating other transitional justice measures to the background. However, the four elements — truth, justice, reparation and guarantees of non-recurrence — should be viewed as components of a comprehensive policy, not as a menu from which Governments can pick and choose or trade off one measure against another.[4] The Special Rapporteur recalls that, legally, there are well-established rights to truth,[5] justice[6] and reparation,[7] and to reforms that enable the realization of those rights; practically, ample international experience grounds the claim that those measures work best when they support one another and no single measure alone can stand for the whole; and morally, there is an obligation to provide redress, in the most comprehensive way, to victims who have endured untold suffering and to ensure that such suffering is never again repeated.

13. Second, a wide array of stakeholders expressed profound concern that transitional justice measures might be implemented selectively to benefit political allies and sympathizers and to disfavour others. Past experience in other countries has shown that the socially integrative potential of transitional justice measures stems from the same basic fact: transitional justice measures are both grounded in and meant to foster human rights. Hence, they must never be used as instruments of "turn-taking". Transitional justice measures must be centred on rights, not interests or considerations of expediency. The necessary and sufficient criterion for accessing those measures should be the violation of rights; factors such as ethnic identity, political affiliation or other considerations have no determining relevance.

14. Third, redressing past massive violations and guaranteeing the rights of citizens in the present are connected issues: a tradition of impunity is both a manifestation and a cause of institutional weaknesses. It is only when institutions show themselves capable of resolving conflicts that they gain the trust of citizens, who then collaborate more with those institutions, which, in turn, enables them to solve problems more effectively. It is impossible to build legitimate, trustworthy institutions, which dislodge abusive practices, without accountability. Some of the challenges that Burundi faces today would be significantly easier to tackle had the country made more progress in addressing a history of impunity that is as long as its history of violations. The Special Rapporteur has already argued that redressing past massive violations does not stem from a retrospective interest per se. The aim, rather, is to provide recognition to victims as rights holders; to promote trust, especially in institutions; to strengthen the rule of law; and to foster reconciliation or social integration. The present report is written in that spirit.

---

[4] See A/HRC/21/46, paras. 22–27 and 62.
[5] See A/HRC/24/42, paras. 18–20.
[6] See A/HRC/27/56, paras. 27–32.
[7] See A/69/518, paras. 14–18.

III. Truth and Reconciliation Commission

A. Context

15. The 2000 Arusha Agreement provided for the establishment of a national truth and reconciliation commission. In its 2005 report, the assessment mission on the establishment of an international judicial commission of inquiry for Burundi recommended a twin mechanism consisting of a truth commission (composed of national and international commissioners) and a special chamber within the court system (see S/2005/158, para. 53). In 2011, a technical committee, chaired by the Minister of Foreign Affairs, advised the Government on the set-up of such a commission and prepared a draft law. The final Law No. 1/18 on the establishment of a truth and reconciliation commission — which departs significantly from earlier drafts — was adopted in May 2014.

B. Mandate, composition and structure

16. The Commission has a four-year mandate to investigate and establish the truth about the gross violations of human rights and international humanitarian law committed between 1 July 1962 and 4 December 2008. Among other competences, the Commission is empowered to propose a reparations programme; a programme to promote pardon and reconciliation; the creation of memorials; institutional reforms to ensure the non-recurrence of past violations; and the rewriting of history.

17. The Commission is an independent institution composed of 11 members, of whom at least 4 must be women and 1 must be a member of the Batwa community. The Commissioners work full time and may not exercise, simultaneously, any other public or private function.

18. The Commission has a Plenary Assembly, a Bureau and subcommissions and will benefit from the assistance of an international Advisory Council made up of five high-ranking persons with great moral authority. The Council will provide ethical support, advice and recommendations, and facilitate the Commission's relationships with national and international actors.

C. Potential challenges in the functioning of the Commission

1. Focus on pardon procedure, sidelining the truth function

19. With the ostensible objective of reconciliation, the Commission is empowered to develop a procedure by which victims can "pardon" perpetrators who so request and express remorse. Based on views gathered during his visit, the Special Rapporteur highlights a serious concern that the Commission's truth-seeking function might be sidelined by overemphasis on the pardon procedure, which, moreover, is being conflated with the objective of reconciliation itself. There are five main issues in that regard.

20. First, reconciliation should not be conceived of as an alternative to justice or an aim that can be achieved independently of the implementation of the comprehensive approach comprising the four measures of truth, justice, reparations and guarantees of non-recurrence.[8] The approach taken in Law No. 1/18 seems to reduce the multifaceted and multistage process of reconciliation to a simple change of attitude which can be brought

[8] See A/HRC/21/46, para. 37.

about in face-to-face encounters. However, contributing to reconciliation efforts is ultimately a question of (re)establishing and enhancing trust in State institutions and among individuals. That trust is not simply bestowed, it needs to be earned. That trust results from the commitment to shared norms, manifested through action, namely, an effort to disclose the truth, to sanction those responsible and to mitigate the consequences of great harms, accompanied by initiatives to prevent the recurrence of the violations. Sustainable national reconciliation cannot be achieved in the absence of such actions.

21. Second, while interpersonal "rapprochement" — particularly at the local level — is important, massive violations are not only a violation of the rights of individuals, but also a fundamental violation of the principle of the rule of law. Individual "pardon" agreements are not an effective and comprehensive response to such systemic and structural violations.

22. Third, Law No. 1/18 does not make a clear determination of the legal consequences of a pardon. Although the Commission is not a judicial mechanism, pardon, in practice, could have legal implications. The pardon procedure could amount to a de facto amnesty, one to be granted by the same individual whose rights were violated. In cases of genocide, war crimes, crimes against humanity, crimes involving sexual violence or other gross human rights violations or serious violations of international humanitarian law, amnesty would be particularly objectionable.

23. Fourth, given the recurring cycles of violence in Burundi, some dating back decades, and the high number of victims and perpetrators, bringing together the appropriate parties in the pardon procedure would be immensely complicated and could lead to denials of fair and equal treatment. One major concern would be the overwhelming institutional burden of achieving the correct victim-perpetrator pairings, which could absorb the majority of the Commission's available resources and capacities.

24. Finally, and perhaps most importantly, the pardon mechanism places an undue burden on victims. Endorsed in the name of reconciliation, yet in a situation in which safety risks have not been neutralized, such a mechanism puts victims in a position whereby refusal to pardon perpetrators, who, in many cases may (still or again) occupy powerful posts, is nearly impossible and may be driven primarily by fear of reprisal. Such pressure is inappropriate and would, at the limit, constitute coercion. Publishing a list of victims who have granted pardons would only increase the pressure on and/or the risks to the victims. Indeed, victims who have suffered violence or trauma should benefit from special consideration and care to avoid retraumatization. For those reasons, the Special Rapporteur is concerned that the pardon procedure places an unnecessary burden on victims and, in the absence of comprehensive transitional justice measures, fails to contribute to reconciliation.

25. The Special Rapporteur stresses that the Commission's success is contingent on placing appropriate emphasis on its truth-seeking and victims-tracing functions. Given the large universe of victims and the multiplicity of the periods of violence, the Commission already has an enormous task ahead to fulfil those functions only.

2. Independence of the Commission

26. Truth commissions, in large part, derive their power from the moral authority and competence of the commissioners.[9] Law No. 1/18 establishes probity, integrity, technical competence and ability to bridge all kinds of divisions as selection criteria. The Commissioners must be impartial, have high moral standards, support reconciliation and not have committed gross human rights violations.

[9] See A/HRC/24/42, para. 53.

27. From a short list of 33 candidates (out of over 700 applications), 11 Commissioners, representing either political parties or members of religious groups, were appointed in December 2014.[10]

28. Many and various interlocutors expressed reservations about the dearth of representation from non-governmental organizations among the Commissioners. During the transitional justice consultations in 2009, many Burundians stated that they were in favour of civil society representation in the future truth commission. The ultimate outcome has generated doubts about the transparency and integrity of the selection process, with allegations that there was a pre-agreed selection.

29. The Special Rapporteur expresses regret at the decision not to include a significant part of civil society — persons with competence and expertise in human rights and transitional justice — in the Commission's membership, as, more importantly, it deprives the Commission, ab initio, of a measure of confidence and credibility that is so needed in the process of truth-telling, which will now have to be built.

30. Truth commissions in all contexts have relied on efforts made beforehand by victims and other organizations to collect and preserve evidence, and to organize, encourage and support witnesses. The newly established Commission cannot afford to work without those and other forms of assistance, which are all dependent on the confidence of victims and on other civil society organizations.

31. The Special Rapporteur points out that the experts of the international Advisory Council (who are not parties to local disputes) can make significant contributions. To be useful, the experts must be called upon to provide substantive advice and the Advisory Council must not be viewed merely as a networking and fundraising resource. Furthermore, the Advisory Council, by design, cannot make up for any deficiencies regarding the independence and capacity of the Commissioners.

3. Protection framework

32. The Special Rapporteur commends the importance that Law No. 1/18 attributes to the protection of victims and witness and the provision that a witness protection law must be promulgated before field investigations can commence. Mindful that protection from various actors, including persons in high-power official and other positions, demobilized former rebels, amongst others, might be necessary, speedy adoption and implementation of the law is paramount.

33. Law No. 1/18 also provides for the establishment of a victim and witness protection and assistance unit, composed of permanent Commission staff with specialized competencies, and who stand out for their impartiality and independence from political, economic or other interests. Victims and witnesses, regardless of background, must feel safe to approach the Commission and to testify freely without fear of stigmatization or reprisal.

34. Protection measures should be broad in scope and include medical and psychosocial support and counselling and access to lawyers. The Special Rapporteur welcomes the envisaged special measures to assist traumatized victims, children, older persons and victims of sexual violence.

[10] Burundi, Decree No. 100/286 (8 December 2014).

4. Gender perspective

35. Law No. 1/18 provides for the appointment of at least four women commissioners. The participation of women increases the likelihood that the Commission will tackle gender issues; however, it neither guarantees that the Commission will adopt a gender perspective, nor that the set-up of a subcommission on gender, victims and witness protection will.[11] The Commission faces a huge task in enabling the discovery of violations against women and girls, including sexual and gender-based violence. Thus, capacity on gender issues among Commissioners and Commission staff is crucial, as are the efforts of the subcommission to mainstream a gender perspective into the Commission's work.[12]

5. Resources

36. Compared with other expenditures, truth commissions are relatively inexpensive; nonetheless, they still require significant resources, secured, ideally, in advance.[13] Law No. 1/18 states that the Commission will be funded through the budget law and by national and international partners. The Commission has been allocated an annual budget of approximately $941,300 for 2015. However, there seems to be doubts about whether sufficient resources will be allocated for the entire duration of the Commission's mandate. Scarcity of resources and unstable flows could severely hamper the work of the Commission.

IV. Delay in justice initiatives

37. The Arusha Agreement set out a comprehensive approach to and the normative boundaries of the post-conflict transitional justice mechanisms in Burundi, including principles and measures to ensure justice for past atrocities.[14] The Agreement is an example of a positive trend in international law that, to secure peace, justice cannot be sacrificed. That notion recognizes that a culture of impunity is at the heart of many cycles of violence. Criminal justice has long been considered an effective way to help break that cycle, in particular through its norm-affirming function and the clear message that no one is above the law.[15]

38. The Arusha Agreement also reaffirms pre-existing obligations under international law[16] to investigate and prosecute those responsible for genocide, war crimes and crimes against humanity, and precludes amnesties for those crimes.[17] The 2009 national consultations followed the same approach as the Agreement.[18] however, despite well-defined legal commitments, the prohibition against amnesties has, in practice, been largely circumvented, and 15 years after the signing of the Arusha Agreement, the implementation of its justice pillar remains an empty promise.

[11] See Burundi, Internal regulations of Law No. 1/18, art. 56.
[12] See A/HRC/24/42, para. 36.
[13] Ibid., paras. 65–67.
[14] Arusha Agreement, Protocol I, chap. II.
[15] See A/HRC/27/56, para. 23.
[16] Ibid., paras. 27–32.
[17] Arusha Agreement, Protocol III, chap. III, art. 26, para. 1 (1).
[18] OHCHR, Rapport des consultations nationales (see footnote 2), pp. 82 and 120.

A. Stalemate in the creation of a specialized justice mechanism

39. The establishment of a specialized justice mechanism for the prosecution of crimes such as genocide, crimes against humanity or war crimes, as provided for in the Arusha Agreement, has been continuously delayed, including by protracted negotiations with the international community. No specific proposals are currently on the table. Furthermore, the existing legal domestic framework only permits the prosecution of such crimes that occurred after 2003.[19] The stalemate in the creation of a specialized justice mechanism has effectively blocked any form of prosecution for crimes occurring before 2003, including during the period with the highest reported level of violence.

B. "Temporary" immunities

40. In accordance with the peace accords, temporary immunity legislation barred the prosecution for past massive violations as ordinary crimes before domestic courts, even if they were not termed acts of genocide, crimes against humanity or war crimes.[20] Initially, the granting of temporary immunities was limited to political leaders of insurgent movements living in exile to enable them to return to the country. In that respect, the immunities regime was an essential component for the successful implementation of the power-sharing provisions in the peace accords.[21] Acts of genocide, crimes against humanity and war crimes were explicitly excluded.[22]

41. The use and interpretation of the temporary immunities gradually expanded in scope. Initially limited to the period of the transition, which came to its constitutionally mandated end in 2005, the current legislation extends the immunities until the establishment of the Truth and Reconciliation Commission and the Special Tribunal.[23] Given the current deadlock regarding the establishment of a specialized judicial mechanism, the benefits of temporary immunity may be extended for many years.

42. Similarly, the range of beneficiaries of temporary immunity has gradually expanded. In addition to political leaders of insurgent movements living in exile, immunity may also be granted to the leadership of the National Council for the Defence of Democracy–Forces for the Defence of Democracy, ordinary combatants and former members of the government security forces. Immunities were also extended to political prisoners, without reference to a specific definition, and convicted detainees. A series of ministerial orders led to the release of over 3,000 prisoners, which has been a source of controversy in Burundian society; a case presented by local human rights groups before the Constitutional Court challenging the ministerial orders was declared inadmissible. The undisciplined expansion of both the subjects and temporal scope of the immunities suggest that, de facto, they have become a permanent amnesty scheme; the benefits are hardly temporary and are contrary to the initial legislation's exclusion of atrocity crimes. Against this background, the Government must initiate serious discussions with all relevant stakeholders, including civil society, on how to reassert, at minimum, the original boundaries of the immunities regime or, more generally, on whether they still serve their legitimate purpose. In any case,

[19] Burundi, Law No. 1/004 (8 May 2008), art. 33, para. 1; Law No. 1/05 (22 April 2009).

[20] Burundi, Law No. 1/022 (21 November 2003); Law No. 1/32 (22 November 2006).

[21] See also Stef Vandeginste, "Bypassing the prohibition of amnesty for human rights crimes under international law: lessons learned from the Burundi peace process", *Netherlands Quarterly of Human Rights*, vol. 29, No. 2 (2011).

[22] Burundi, Law No. 1/022, art. 2; Law No. 1/32, art. 2, para. 2.

[23] Law No. 1/32, art. 2, para. 2; Law of 18 September 2009 on revising the Electoral Code (Law No. 1/015 of 20 April 2005), art. 8.

amnesties covering genocide, crimes against humanity, war crimes, gross human rights violations or serious violations of international humanitarian law, either de jure or de facto, are inadmissible under international law.

C. Is the Truth and Reconciliation Commission further delaying justice?

43. In contrast to earlier drafts, the enacted version of Law No. 1/18 does not include reference to a judicial mechanism. Moreover, the Government has stated that the Truth and Reconciliation Commission must conclude its work before the Government decides how to proceed with judicial investigations. Article 61 of Law No. 1/18 seems to suspend all criminal proceedings until the Commission issues its conclusions. That is a disturbing departure from the commitments made at Arusha.

44. It took almost 14 years after the signing of the Arusha Agreement to establish the Truth and Reconciliation Commission, and it may take another 5 years before the Commission concludes its work. Burundi cannot afford to put off justice considerations any longer. Making concrete the promise made in Arusha to implement the justice mechanism would demonstrate that the pardon procedure provided for in Law No. 1/18 can be compatible with justice and that reconciliation is not sought through yet another inequitable transfer of burden to victims – that is, the sacrifice of their right to justice.

45. Furthermore, the passage of time increases obstacles to judicial procedures, including the death of victims and witnesses. Judicial investigations and prosecutions always rest upon important but time-consuming and time-sensitive preparatory work, of which gathering and preserving relevant evidence and documentation is foremost.

46. The preparatory work also requires the development of a prosecutorial strategy, which accounts for the magnitude of the task and existing constraints.[24] To safeguard the impartiality of prosecutors is paramount in order to prevent criminal justice from becoming an instrument of the powerful.

V. Broader reparation efforts required

47. Reparation initiatives in Burundi have focused mainly on land restitution and largely omitted other aspects of reparation.[25]

A. Land restitution

48. Against the background of strong demographic growth, increasing scarcity of arable land and the return of some 800,000 refugees over the last decade, the issue of land is crucially important in the country's post-conflict development. The problem is aggravated by the reliance of more than 90 per cent of the population on agriculture for their livelihood. The majority of land disputes relate to claims raised by returnees (mostly Hutus) of the 1972 massive violations against those (frequently Tutsis) who subsequently acquired the assets.

49. Until 2011, the Land Code retained the principle of "acquisitive prescription" after 30 years, irrespective of the buyer's "good faith". Between 2002 and 2011, that resulted in the unconditional acquisition of land occupied three decades earlier, that is, between 1972

[24] See A/HRC/27/56, paras. 105–108.
[25] See A/69/518.

and 1981. The issue was complicated by the 1972 decision of the War Council[26] to sentence rebels to death and confiscate their land and other assets.

50. The Arusha Agreement guarantees the right to property and the basic principle of the restitution of land to all refugees and *sinistrés*,[27] referring to fair compensation when the recovery of the property proves impossible.[28] The Agreement provides for the establishment of a national commission to coordinate the return of refugees and *sinistrés*, which, shortly after the 2005 elections, was replaced by the National Commission on Land and Other Assets.[29]

51. Initially under the guardianship of the First Vice-President, the National Commission was regarded as fairly independent of the Government and the political majority, and the public perceived it as contributing to the reconciliatory objective. To consider an individual case, the respective Commission was composed of two public servants, one judge, a representative of civil society and a member of a religious confession. Such composition reportedly contributed to its success at settling cases amiably. In the absence of agreement, the Commission typically decided that the parties should split the land.

52. A 2009 legislative amendment altered the composition, inter alia, of the Commission (removing the presence of a judge and a religious figure) and strengthened the Commission's power vis-à-vis the courts. The latter development led to both a growing rivalry between the Commission and the justice sector and increasing legal uncertainty. The 2013 legal revision placed the Commission under the guardianship of the President of the Republic.

53. The Special Rapporteur was informed that the Commission had decided about 40,000 of the total of 50,000 land claims. Various interlocutors reported that some of the Commission's decisions were increasingly seen, a priori, as favouring the restitution of land to the *sinistrés* over the good faith buyer — whose land had been expropriated, frequently without compensation. Some suggest that cases were decided based on affiliation. That generated serious concern about the resurrection of ethnically based tensions, contrary to the Commission's mandate to contribute to the respect of human rights, reconciliation and social peace.[30]

54. In the face of increasing contention over the Commission's work, the high number of property cases dealt with by the ordinary justice system, rivalry with the courts and the ensuing legal uncertainty, the Special Court on Land and Other Assets was established in 2014. The two-tiered Court is composed of magistrates and jurists appointed by the executive. It has a seven-year mandate and is competent to hear appeals of either party against decisions of the National Commission (even those taken prior to the creation of the Court).

55. The Special Rapporteur highlights the importance of both the National Commission and the Special Court functioning independently and impartially, free from considerations related to ethnic or political motivations or objectives. He also underlines that the Constitution of Burundi and the Arusha Agreement provide for just and fair compensation in cases of expropriation.

---

[26] See Burundi War Council, decision RMP 48 229/OC of 6 May 1972.

[27] The Arusha Agreement, Protocol IV, art. 1, para. 2, defines "*sinistrés*" as "all displaced, regrouped and dispersed persons and returnees"; the 2013 Law on the National Commission on Land and Other Assets provides an even broader definition.

[28] Arusha Agreement, Protocol IV, art. 8 (c).

[29] Burundi, Decree No. 100/205 (22 July 2006); Law No. 1/18 (4 May 2006).

[30] Burundi, Law No. 1/31 (31 December 2013), art. 11.

B. Need for broader land reform and land access for women

56. Even the supporters of the National Commission on Land and Other Assets and the Special Court recognize that those bodies cannot resolve the delicate issue of land. Rather, broader initiatives for the rational use of land are required. Efforts at restitution, at best, lead back to the status quo ante, which, while important for the neutralization of unfair dispossession, does not guarantee either just overall distribution or sustainable development.[31]

57. Succession rights in Burundi are regulated by customary law,[32] which does not guarantee the right of women and girls to inherit land.[33] A significant number of households headed by single mothers are at risk because of a reported erosion of a customary usufruct that unmarried women or widows used to obtain to satisfy their alimentary needs when the land was inherited by the male heir. Furthermore, women seem to remain disadvantaged with regard to the purchase of land as the emergent market reflects dominant gender hierarchies.

C. Comprehensive reparation programme

58. Law No. 1/18 empowers the Truth and Reconciliation Commission to make recommendations regarding a reparations programme and to issue immediate reparation orders if "the circumstances and the means allow it". The law stipulates that reparations should take into account the harm suffered by the victims and "the available resources and the realities of the country".

59. Many ambiguities concerning reparations in the law need to be clarified, including the aforementioned conditionalities relating to resources. Burundi faces significant resource constraints,[34] as manifested by its high poverty rate, its heavy reliance on donors to cover parts of its budget and the low levels of foreign direct investment. Nonetheless, space for action exists within those constraints.

60. There is no obvious direct correlation between the degree of socioeconomic development of a country and the magnitude of its reparation programmes. Some countries with relatively wealthy economies have established programmes that are not particularly munificent; while other countries with comparatively smaller economies have established programmes that distribute relatively large benefits.[35]

61. Overall, the record shows that political factors, rather than economic constraints, determine the existence and shape of reparation programmes. The Special Rapporteur reminds the Government of Burundi that economic constraints do not displace legal obligations.

62. Similarly, he underscores that there should be no confusion or trade-off between reparation programmes and development initiatives. Given the circumstances in Burundi, both are necessary; each is independently justified; and the synergies between them can be maximized. However, reparations involve explicit recognition of responsibility for rights violations.

---

[31] See also E/C.12/BDI/1, paras. 255–257.
[32] Ibid., para. 67.
[33] See CEDAW/C/BDI/CO/4, paras. 13 and 14; CCPR/C/BDI/CO/2, para. 11.
[34] See also United Nations Development Programme, Human Development Index (2013), Burundi (rank 180 out of 187).
[35] See A/69/518, paras. 51–61.

63. Given its mandate, the Truth and Reconciliation Commission should initiate discussions about the design of a reparations programme and involve civil society and victims from the outset. That would help ensure that the final programme not only truly addresses the harm suffered, but also enables the victims, particularly women and girls, to overcome pre-existing patterns of discrimination and inequalities.[36]

64. To that end, any future reparations programme should include support for education, which can be an important tool for the reintegration of victims by providing opportunities to develop their capabilities and increasing their ability to ensure a sustainable income and thereby overcome patterns of discrimination. Education programmes also contribute to the transformation of mindsets about conflict and human rights violations. However, such initiatives that target direct and/or indirect victims must not be confused with the State's duty to ensure access to education for the entire population or with development programmes.[37]

65. The Truth and Reconciliation Commission must ensure that rights are at the centre of its recommendations on reparations. The violation of rights, and not other considerations, including ethnicity or political affiliation, is the sufficient condition for accessing benefits. The Special Rapporteur emphasizes that transitional justice measures, reparations included, must never be used as instruments of "turn-taking".

D. Immediate assistance programmes for victims

66. Because the needs of some victims — including elderly or infirm widows, orphans and internally displaced persons — are particularly pressing and cannot wait until the Commission has concluded its work to be addressed, immediate assistance programmes for such persons, among other vulnerable groups, should be established. Such programmes, like humanitarian assistance programmes, are meant to help victims meet their most urgent needs, including with regard to health care, education and shelter.

VI. Institutional reforms crucial to guaranteeing non-recurrence

67. While the peace agreements, the 2005 Constitution and the massive demobilization and reintegration processes have created a solid basis to prevent the recurrence of violence in Burundi, there are several areas that merit immediately more concentrated efforts.

A. Security sector reform

68. In accordance with the parameters of the various peace agreements, by the end of April 2015, Burundi had undertaken commendable, wide-ranging security sector reform efforts, involving the demobilization of ex-combatants and the integration of large numbers into the military and police forces.

69. The integration process was a highly prominent feature of the post-war transition. Following decades of a close to mono-ethnic security sector, the guarantee of ethnic parity in the national defence force, the national police and the intelligence services was a key demand in Arusha, with subsequent successful implementation. According to observers, inter-ethnic tensions in the security sector, especially in the military, no longer seemed to

[36] Ibid., paras. 68–73.
[37] Ibid., paras. 38–42.

be an issue. The quota-based integration policies had contributed to stability and to minimizing the potential for future inter-ethnic violence.

70. Strong support from partners had contributed to those advances. The Strategic Framework for Growth and Poverty Reduction — phases I and II — considered demobilization, disarmament and reintegration and security sector reform as key components and the Government had adopted a national security strategy in 2013. The Special Rapporteur welcomed those commitments and underlined the importance of tackling the remaining issues, which are essential to the prevention of future violations.

71. Burundi's approach to military, police and intelligence reform has omitted the link between security and justice, which risks undermining the security sector reform process and failing to ensure the non-recurrence of violence. More recent incidents, such as acts of violence committed by youth militias affiliated with political parties, underline the need for sustained and comprehensive reform (see para. 10 above), as they constitute a risk well beyond the election period[38] and a concern for sustaining democratic control over the security sector. To that end, more efforts in the following three areas are crucial.

1. Professionalization

72. Popular perceptions of the security sector, in particular the armed forces, had improved over the past years. Prior to the events that took place in April 2015, resulting from the announcement by the incumbent President that he intended to run for a third term, attitudes towards the police had also started to change.[39] Programmes such as proximity/community policing, military ethics and open days had contributed to that. However, the events since 25 April 2015 demonstrated that the police functions as an extended arm of the governing party, supressing peaceful protests with violence. The national intelligence service still ranks the lowest in terms of public perception, with particular concerns about it fulfilling its constitutionally-mandated role in an apolitical and non-partisan manner.[40]

73. In a security sector previously involved in massive violations, traditional professionalization efforts are important but insufficient to restore trust, particularly with regard to victims and other marginalized groups. An institution that is being re-established or reformed must come to terms with its abusive past and demarcate a new beginning to distance it from its legacy. To that end, educating both new recruits and long-standing members on that abusive past is central to forging a new institutional identity.

74. The composition of the police continues to pose legitimacy, management and discipline challenges, particularly as no screening has occurred since its creation in 2004. The police's understanding of its role with respect to the population, civil society and the media needs significant enhancement.

2. Civilian oversight

75. In recent years, Burundi has developed multiple accountability (oversight) mechanisms in the security sector, most directly derived from the Constitution, such as parliamentary oversight committees, the Office of the Ombudsman and the independent National Human Rights Commission. Those oversight bodies remain weak and should be

[38] See S/2014/36, paras. 8 and 69, S/2014/550, para. 12.

[39] See, for example, Centre d'alerte et de prévention des conflits/ Centre de recherche, d'études et de documentation en sciences sociales, *Etude sur les besoins de sécurité au Burundi* (May 2012).

[40] See *Evaluation de la réforme de la sécurité et de la justice au Burundi*, Rapport final (February 2014), chap. 4.4. Available from http://issat.dcaf.ch/content/download/58219/950503/file/Evaluation%20Burundi%20-%20Rapport%20Final%20-%2011-02-2014.pdf.

strengthened, particularly through more systematic resourcing, adequate legislation regulating and distinguishing their role and competencies, and political signals encouraging cooperation with those bodies.[41] Enormous deficiencies in civilian oversight of the national intelligence service still exist, leading to a complete lack of accountability.

76. Coordination between oversight mechanisms should also be strengthened. For example, in a recent audit report,[42] the Inspector General for Public Security, responsible for internal police oversight, noted that coordination with other oversight institutions, such as the Ombudsman, the National Human Rights Commission and civil society, was non-existent. In the present report, the Special Rapporteur makes recommendations aimed at remedying those deficiencies and suggests measures to strengthen the autonomy and independence of the Inspector General for Public Security. Furthermore, overlapping roles and responsibilities between the Ministry of Public Security and the Directorate General of the Police have contributed to a lack of effective oversight. It is hoped that the revision of the organic law on the National Police will be an important step towards addressing that shortcoming.

77. Civil society groups such as the media, human rights organizations and other non-governmental organizations should provide informal accountability. The Special Rapporteur welcomes policy documents in the area of the security sector that recognize the importance of including civil society.[43]

3. Vetting

78. The Arusha Agreement provides that all persons found guilty of acts of genocide, coups d'état, violation of the Constitution and human rights and war crimes shall be excluded from both the national police and the armed forces.[44] Following the Arusha negotiations, the notion of vetting was enshrined in, inter alia, the 2004 organic laws on the National Defence Forces and the National Police, while the Electoral Code stipulated that elected officials would automatically lose their mandates if responsibility for such serious crimes was established by the Special Tribunal or the national Truth and Reconciliation Commission.

79. Despite those legal requirements, no process has yet been established to vet and exclude officials who were involved in serious violations in the past. Recent policy documents, such as the National Security Strategy and the Strategic Framework for Growth and Poverty Reduction, fail to address the issue and no discussions appear to be under way on vetting.

80. While acknowledging the significant challenges in establishing a comprehensive vetting programme, the Special Rapporteur recommends some targeted first steps, which could include conducting a census and registration programme to determine the pool of personnel to screen for past human rights violations. Those processes must be transparent and adhere to due process standards.

81. As provided for in the 2004 organic law on the National Police, vetting programmes could be linked to recruitment policies and promotion schemes; however, the mandated policy appears not to have been implemented.

---

[41] Ibid, chap. 4.5.

[42] See *Audit de l'inspection générale de la sécurité publique du Burundi*, Rapport final (May 2014). Available from http://issat.dcaf.ch/content/download/60044/984488/file/Audit%20IGSP%20Burundi%20-%20Rapport%20final%20après%20restitution%20-%2013.05.2014.pdf.

[43] See S/2014/550, para. 18.

[44] Arusha Agreement, Protocol III, chap. II, art. 14, paras. 1 (e) and 2 (d).

B. Justice system reform

82. The Arusha Agreement identified lack of respect for the principle of the separation of powers and the independence of the judiciary as being among the main causes of violence and insecurity in Burundi, in the post-colonial period.[45] Under the Sectoral Policy of the Ministry of Justice 2011-2015, some improvements included an increase in the number of judges and jurisdictions and better working conditions for judges. The 2009 Criminal Code abolished the death penalty and criminalized genocide, war crimes, crimes against humanity, torture and sexual violence, while the 2013 Criminal Procedure Code established reparation for cases of torture.[46] In 2014, advances in the recruitment of judges included, for the first time, a competitive process and initial professional training and the number of women judges has reportedly increased recently.

83. However, crucial legal and practical barriers to the functioning of the judiciary remain, starting with the appointment and career development of judges.[47] Life tenure of judges is limited by a provision allowing for their discretionary transfer to another jurisdiction. The direct supervisor initiates disciplinary measures for lesser degree infractions, while the executive controls the suspension of ordinary judges. Although the dismissal of judges and the suspension of the Presidents of the Supreme and Constitutional Courts as well of the General Prosecutor require the prior opinion of the Superior Judicial Council, it is the executive that controls the Council (see para. 85 below).

84. Financial autonomy and adequate resourcing are prerequisites for the independent and effective functioning of the judiciary. Information received indicates that only about 2 per cent of the national annual budget is allocated to the justice system, an insufficient amount to enable it to adequately discharge its functions. In some jurisdictions, the most basic resources and equipment are not available. Although the Supreme Court, the Constitutional Court and the Superior Judicial Council each have their own budget, they are included in the global, annual allocation of the Ministry of Justice which administers all budgets in the sector.

85. Many of the structural barriers to judicial independence have been the focus of much discussion in the past, but follow-through is lacking. For example, the discussions during the Estates General on Justice in 2013 have not yet been fully published. A main issue discussed was the composition of the Superior Judicial Council. The 17-member Council is chaired by the President of the Republic, assisted by the Minister of Justice; the executive designates 5 members and appoints 3 private-sector lawyers, and 7 judges are elected by their peers. Hence the majority of the Council members are either part of or appointed by the executive. A constitutional reform project aimed at, inter alia, altering the composition of the Council in order to reduce executive interference in the administration of justice was not adopted by Parliament in 2014.

C. Access to justice and legal empowerment

86. In recent years, the publication of legislation, bylaws and a guide on the use of judicial services, in addition to the establishment of information desks in the different jurisdictions, have improved access to justice to some extent. However, the lack of systematic translation of legal texts into Kirundi hampers the rights claims of approximately 90 per cent of the population, who do not speak French.

[45] Arusha Agreement, Protocol III, art. 2, para. 8.
[46] See CAT/C/BDI/CO/2, paras. 5 (a) and (b).
[47] See CCPR/C/BDI/CO/2, para. 19.

87. Access to justice remains a concern given the cost implications and the high poverty rate. While the authorities have reportedly developed a legal aid strategy and designated a separate line in the 2015 budget, no legal framework to administer a corresponding fund has been created. Provinces lack lawyers, which deprives most of the rural population of legal assistance.

88. The Bar and non-governmental organizations have developed pilot projects to provide legal aid for the most vulnerable groups. The Special Rapporteur welcomes those efforts to enhance legal empowerment of the population and encourages their expansion.

D. Education, memorialization and archives

89. The Special Rapporteur emphasizes the importance of initiatives in three areas that lie at the intersection of institutional, cultural and individual spheres, all contributing to the effort to prevent similar violations in the future.

1. Education

90. The Arusha Agreement referred to the diverging interpretations of the past as one of the root causes of the conflict.[48] Despite some initial efforts,[49] a shared post-independence historical narrative is missing. Formal teaching of the recent history of Burundi is currently limited to a timeline that lists key events, but provides neither context nor analysis.[50] Consequently, at the family and community levels, informal narratives, which replicate old divisions of identity and reproduce fear and injustice, are transmitted[51] and further aggravated by a lack of institutional memorialization processes.

91. Law No. 1/18 provides for the Truth and Reconciliation Commission to play a key role in proposing measures and contributing to the rewriting of Burundian history in order to arrive at a commonly shared historical narrative. Welcoming this, the Special Rapporteur emphasizes that truth commissions on their own are not the most suitable instruments for a "final" rewriting of history. However, through independent and impartial investigations and meticulous attachment to respectable methodology, they can establish a factual basis for shared histories. Truth commissions can also catalyze important curricular reforms and lay the foundation for teaching materials and appropriate pedagogical methods. In that connection, the Special Rapporteur welcomes the fact that the Commission has been tasked with providing a simplified and pedagogical version of its report for the general public and schools.

2. Memorialization

92. The limited number of official memorials and remembrance processes stands in sharp contrast to the very large number of violent acts in Burundi's recent history. No official policy on memorialization exists; therefore, most initiatives are citizen-led. A framework for memorialization would, importantly, signal the Government's support for those initiatives. The Special Rapporteur visited a few memorial sites, including in Kibimba and Gatumba, and noted the importance that the population, particularly victims, attached

[48] Arusha Agreement, Protocol I, chap. I, art. 3.

[49] For example, by the Comité scientifique de réécriture de l'histoire du Burundi and the project "Ecrire l'histoire du Burundi", with the support of the United Nations Educational, Scientific and Cultural Organization.

[50] United Nations Children's Fund, "The role of education in peacebuilding in Burundi", Policy brief, p. 3.

[51] Ibid.

to them. In that connection, he expresses concern at the Government's reported interference in memorialization initiatives.

93. The Arusha Agreement and the 2009 national consultations highlighted the importance of memorialization.[52] The Special Rapporteur welcomes the fact that the mandate of the Truth and Reconciliation Commission includes proposing memorialization efforts; he encourages the Commission to give new impetus to Government activities.

94. The Special Rapporteur is highly concerned about reports regarding the uncovering and subsequent and continuing destruction of human remains in a number of places, including in Kivyuka (Bubanza Province) and Zega (Gitega Province). That is indicative of serious structural problems in the preservation of mass graves and other burial sites. A framework, including relevant legal protocols or procedures, for the proper management of such sites is needed urgently.

95. The Special Rapporteur welcomes the fact that the mandate of the Truth and Reconciliation Commission explicitly includes identifying and mapping mass graves and other burial sites. However, the Commission, as a temporary body, faces constraints and cannot carry the entire burden of the identification, preservation and protection of mass graves. It is the authorities who bear the main responsibility. As an immediate first step, the mapping of mass burial sites throughout the country, incorporating earlier efforts of international actors to preserve and secure those sites, must be undertaken. Such mapping must draw on the knowledge of civil society organizations.

3. Archives

96. Establishing archives of past violations has been low on the official agenda. According to the information available, there are no systematic efforts or standardized procedures to collect and archive relevant records. Combined with a lack of awareness and expertise, important information is not being adequately preserved and may be lost or destroyed. Law No. 1/18 addresses only the issue of the Commission's archives. While that is important, the Government also must adopt a general policy on national archives in line with international standards, the development of which should benefit from international expertise. The independent National Human Rights Commission could play an important role in that regard, and the creation of a documentation centre in the long term should be considered.

VII. Observations and recommendations

A. Observations

97. **Since the signing of the Arusha Agreement, and in particular the adoption of the 2005 Constitution, which institutionalizes the power-sharing arrangement, Burundi had made significant strides to end and overcome conflict up to April 2015. Burundi has established one of the world's most ambitious consociational arrangements, which arguably contributed significantly to the transformation of relations between different groups. Massive demobilization and reintegration efforts, combined with agreed ethnic representation in all official institutions, including the security sector, had further enabled the country to ensure a degree of stability since 2009.**

[52] Arusha Agreement, Protocol I, chap. II, art. 6, paras. 7 and 8.

98. By the end of April 2015, concerns about the 2015 electoral process had deepened, including remaining doubts about the constitutionality of a third presidential term, the effectiveness and impartiality of electoral mechanisms and the serious threats to the process posed by acts of harassment, intimidation and violence by youth militias, including one which was openly supporting the Government. An electoral process that lacked credibility — especially one that triggered outright violence — would be a huge setback for Burundi and would harm the progress that had been achieved with much effort.

99. If Burundi had maintained its commitment to the path it had followed since the signing of the Arusha Agreement up to the end of April 2015, the challenge ahead would be not only one of staying the course, but of accelerating the pace of transition to a rule of law-based society. Against that background, it would be a mistake to think that redressing past massive violations and protecting and promoting rights in the present and the future are mutually exclusive.

100. Serious efforts to redress past massive violations would signal to the population that the authorities are sincere in breaking with the tradition of impunity. That, in turn, would contribute to the protection of fundamental rights in the present. Transitional justice initiatives must be grounded in and intended to foster human rights. They must not be instruments of "turn-taking" that only benefit one side.

101. The Special Rapporteur commends Burundi for establishing the Truth and Reconciliation Commission and underscores the centrality of the Commission's independence in order for it to gain credibility and the trust of the population, in particular victims. He also warns against turning the Commission into a mere pardon mechanism which would derail its major truth-seeking function. Individual pardon agreements cannot constitute an effective and comprehensive response to violations of the fundamental principle of the rule of law that resulted from the massive individual violations.

102. Not even a functional truth commission can exhaust the agenda of transitional justice. In the past decade, the focus on establishing a truth commission has taken precedence over other main areas of transitional justice, which deserve closer attention and action.

103. The Special Rapporteur is gravely concerned that discussions in the area of criminal justice for massive violations have come to a halt. Delaying discussion on the setting up of judicial mechanisms until the conclusion of the Truth and Reconciliation Commission's work means that justice will be foregone in a great number of cases. Furthermore, the "temporary" immunities regime, which has been significantly expanded in scope, is effectively blocking prosecution efforts.

104. Reparation initiatives, thus far, have focused mainly on the restitution of land, while other forms of reparation, particularly rehabilitation of victims, have been excluded. In recent years, land disputes have become an area for the potential resurrection of tension with ethnic connotations. The independent and impartial functioning of the Commission on Land and Other Assets and the newly established Special Court are crucial in ensuring that those disputes are settled without consideration of ethnic, political or other affiliation.

105. While commendable achievements in the area of demobilization, disarmament and reintegration were made, the necessary link between security sector reform and justice efforts is missing. Establishing that link will be decisive in helping to prevent future violations.

106. The need for reform to establish an independent judiciary is broadly acknowledged. However, the executive branch and the governing political party continue to control the justice sector at all levels.

107. Burundian society has suffered from decades of unaddressed intergenerational transmission of violence. Four ways to counter the transfer of historical narratives that replicate old divisions of identity and reproduce fear and injustice are: (a) to develop curricula and teaching methodologies that foster objectivity, analysis and dialogue; (b) to support, not control or impede, memorialization activities consistent with respect for the facts and the memories of others; (c) to map and recover burial sites; and (d) to strengthen archival resources, including documentation, on past violations.

B. Recommendations

108. The Special Rapporteur urges the Burundian authorities to refrain from using transitional justice initiatives as instruments of "turn-taking", but instead, together with the whole Burundian society, develop and implement measures that genuinely redress past massive violations, and devise effective strategies to prevent the recurrence of such violations.

109. Recalling the importance of the Arusha Agreement and the 2005 Constitution with regard to truth-seeking, the Special Rapporteur calls on:

(a) The Truth and Reconciliation Commission:

(i) To prioritize the establishment of facts and to refrain from using the pardon procedure in ways that would impede the clarification of facts or criminal prosecutions;

(ii) To recruit civil society representatives specialized in human rights to its staff and to involve civil society and victims in its work, highlighting the importance for the Commission;

(iii) To utilize the expertise of the international Advisory Council in substantive matters and to allow the Council to exercise its functions unhindered;

(iv) To conduct targeted training on gender issues for Commissioners and staff and to ensure that a gender perspective is adequately mainstreamed into its work;

(b) The Commissioners, against the complicated background of the selection process, to work with independence and impartiality for the benefit of the whole of Burundian society;

(c) The relevant State bodies to expedite the adoption of a victim and witness protection framework, attentive to the protective needs arising from the activities of State and non-State actors;

(d) The Government to allocate sufficient resources throughout the mandate of the Commission to enable it to work independently and efficiently;

(e) Funding agencies to support the Commission in a sustainable way.

110. Regarding justice initiatives, the Special Rapporteur urges the Government:

(a) To immediately resume discussions, without waiting for the Truth and Reconciliation Commission to complete its work and with the participation of civil

society, including victims, on proposed concrete models for a judicial mechanism to prosecute genocide, crimes against humanity, war crimes or other gross human rights violations or serious violations of international humanitarian law;

(b) To revisit the current interpretation and application of the regime of "temporary" immunities in order to remove legal and practical obstacles to the prosecution for past massive violations, in accordance with the framework agreements;

(c) To immediately undertake preparatory work for judicial investigations and prosecutions of past massive violations in the framework of a prosecutorial strategy that pays special attention to sexual and gender-based violence and safeguards the independence and impartiality of the prosecutors;

(d) To allocate adequate resources for documentation and the provision of specific training for investigators on forensic investigation and sexual and gender-based violence.

111. In the area of reparations, the Special Rapporteur:

(a) Reiterates the need for both the National Commission on Land and Other Assets and the Special Court to function in an independent and impartial manner, free from all discriminatory ethnic or political motivations or objectives;

(b) Calls for broader land reform to overcome pre-existing patterns of discrimination and, in that respect, increase access to land by women, through a comprehensive revision of existing legislative provisions on inheritance rights, registration and titling;

(c) Calls on the Truth and Reconciliation Commission to initiate discussions, with the involvement of civil society, including victims, on a feasible comprehensive reparation programme, with specific attention to health and education;

(d) Calls for the set-up of immediately available victims assistance programmes, dedicated to the most vulnerable groups.

112. With regard to guarantees of non-recurrence, the Special Rapporteur recommends that the authorities in the area of:

(a) The security sector:

(i) Ensure that reform is linked to justice, taking into account the legacies of past violations by security institutions;

(ii) Enhance the capacity of the security sector, in particular the police and the national intelligence service, to fully understand their roles with respect to the population and the roles of civil society and the media;

(iii) Strengthen constitutional civilian oversight bodies, such as the Ombudsman and the independent National Human Rights Commission, and address, as a matter of priority, the enormous deficiencies in civilian oversight, in accordance with the Constitution, of the national intelligence service;

(iv) Strengthen coordination and interaction of internal oversight bodies, including the Inspector General of Public Security, with formal and informal civilian oversight mechanisms, including civil society organizations;

(v) Address overlaps in the structure of national police roles and responsibilities, especially between the Ministry of Public Security and the Directorate General of the Police;

(vi) **Ensure adequate space for informal accountability mechanisms provided by civil society, the media, human rights and non-governmental organizations;**

(vii) **Continue efforts to professionalize the security sector through structured and coordinated training programmes in human rights for the security forces, particularly the police force and the national intelligence service, with an emphasis on recognition of the legacies of past violations by security institutions;**

(viii) **Pending comprehensive reform, take targeted first steps in the area of vetting, including a census and registration programme for screening past human rights records, and consider linking such programme with recruitment and promotion procedures, in accordance with due process standards;**

(b) **Judicial reform:**

(i) **Publish in full the results and deliberations of the Estates General on Justice and implement the planned follow-up mechanisms;**

(ii) **Revisit constitutional and legislative provisions to embody respect for the principle of the separation of powers among the three branches of power, thereby strengthening the independence of the judiciary and guaranteeing judicial self-regulation, in law and in practice;**

(iii) **Review the composition of the Superior Judicial Council to shield it from control by the executive over the judicial branch, through appointments, promotions and disciplining procedures, and vest the Superior Judicial Council with enhanced competencies over all procedures that govern the career of magistrates;**

(iv) **Increase the annual budget for the judiciary and review relevant legislation to ensure judicial financial autonomy;**

(c) **Legal empowerment: redouble efforts to ensure access to justice for all; and civil society is encouraged to expand initiatives to strengthen legal empowerment of the population, including through legal aid projects for the most vulnerable;**

(d) **History, memorialization and archives:**

(i) **Review the history curricula in order to foster dialogue and social cohesion; review and incorporate past initiatives on rewriting the contemporary history of Burundi;**

(ii) **Promote citizen-led initiatives in the area of memorialization, by guaranteeing even-handed support for such initiatives;**

(iii) **Put in place immediate measures to locate and preserve mass graves and other burial sites, and establish relevant legal protocols or procedures;**

(iv) **Start mapping mass burial sites throughout the country, drawing on the knowledge of civil society;**

(v) **Establish a policy on national archives, in accordance with the right to know the truth about past violations, and seek international expertise to assist in the development of such a policy.**

United Nations A/HRC/30/43

General Assembly

Distr.: General
13 August 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte

Summary

In this report, the Independent Expert on the enjoyment of all human rights by older persons addresses the right to autonomy and care, which she considers to be priority areas. The report provides an overview of the existing international and regional human rights standards and analyses in depth these two key concepts, as well as their scope. This is followed by the Independent Expert's conclusions and a number of recommendations aimed at assisting States in implementing appropriate and effective frameworks that strengthen the autonomy of older persons, ensure their active involvement and participation in all spheres of life and improve their well-being and quality of life, as well as ensuring a human rights-based approach to care settings.

GE.15-13731(E)

Please recycle

Contents

		Page
I.	Introduction	3
II.	Activities of the Independent Expert	3
III.	Autonomy and care	4
	A. Legal framework	5
	B. Autonomy	9
	C. Care	13
IV.	Conclusions and recommendations	16
	A. Conclusions	16
	B. Recommendations	16

I. Introduction

1. The present report is submitted by the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, pursuant to Human Rights Council resolution 24/20.

II. Activities of the Independent Expert

2. During the reporting period, the Independent Expert visited the following countries: Slovenia, from 17 to 21 November 2014 (see A/HRC/30/43/Add.1); Austria, from 22 to 30 January 2015 (see A/HRC/30/43/Add.2) and Mauritius, from 28 April to 8 May 2015 (see A/HRC/30/43/Add.3). She expresses her appreciation to the Governments of those countries for their cooperation before and during her visits.

3. The Independent Expert has identified elder abuse as a priority area for her mandate, and has participated in a number of events addressing this issue during the past year. On 12 September 2014, she participated in a side event on "Elder abuse and violence against women: a global crisis". The event was organized by the Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva on the margins of the twenty-seventh session of the Human Rights Council. In her statement, she highlighted the importance of large-scale research, data and indicators, and legal and institutional mecianisms to tackle elder abuse effectively.

4. She also participated in a side event on the occasion of the United Nations World Elder Abuse Awareness Day on 15 June 2015, entitled "Falling between the cracks: abuse and violence against older women — marking World Elder Abuse Awareness Day—10 years on", co-organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Geneva NGO Committee on Ageing, with the support of the United Nations Population Fund and several civil society organizations in Geneva.

5. In her statement, the Independent Expert drew specific attention to the recommendations in the Madrid International Plan of Action on Ageing on elder abuse, including against older women, and called for their implementation. She also encouraged further cooperation among all actors to combat all forms of abuse and violence against older persons and to promote the human rights of these persons.

6. Also on 15 June, she participated through a video statement, in a conference on "Tackling elder abuse in Europe: a renewed commitment or a missed opportunity?", which was organized in Brussels by the Council of Europe, the European Commission, AGE Platform Europe and the European Network of National Human Rights Institutions. She highlighted the positive initiatives that had been undertaken at the regional level, and recalling the obligations of Member States, urged them to renew their commitments to ensuring that older persons lived free from abuse and violence in all circumstances.

7. Marking the twenty-fourth anniversary of the United Nations International Day of Older Persons in Geneva, on 1 October 2014, the Independent Expert participated in a side event entitled "Leaving no one behind: promoting a society for all". In her address, she emphasized the need for a holistic approach to protecting and respecting the human rights of older persons to address the challenges they faced on a daily basis.

8. The issue of care is another thematic priority for the mandate holder. In her video message of 8 October 2014, in the context of the Conference on Human Rights of Older Persons in Long-term Care, organized in Brussels by the European Commission and the European Network of National Human Rights Institutions, she advocated for a human rights-based approach for older persons in long-term care, in order to ensure a life of dignity for them. She also addressed the Group of 7 third Global Dementia Legacy Event in

Japan through a statement on 5 November 2014, highlighting the importance of a human rights-based approach when addressing dementia, innovation in care and risk reduction.

9. On 16 and 17 March 2015, she delivered a keynote speech at the World Health Organization's first Ministerial Conference on Global Action against Dementia, held in Geneva. She stressed the importance of considering older persons with dementia as rights holders and States as duty bearers with international obligations to respect, protect and promote human rights. The Independent Expert was pleased to note that, for the first time, States were integrating a human rights-based approach into their call for action against dementia, which was adopted on 17 March as an outcome of the conference.

10. The Independent Expert is mandated to pay particular attention to different groups of older persons, including refugees and climate-displaced persons, as well as persons facing conflict, emergency or disaster situations. On 18 March 2015, she participated in a side event in Geneva on the margins of the twenty-eighth session of the Human Rights Council, on "Building climate resilience: the rights of groups in focus", organized jointly by OHCHR, Displacement Solutions and the Applied Research Association on Justice, Peace and Development.

11. On 11 June 2015, the Independent Expert participated in a follow-up expert round-table discussion on "Climate displacement and human rights" at the Centre for Humanitarian Dialogue, Geneva. In her presentation, she highlighted the fact that older persons were disproportionately affected by climate change, and referred to initiatives that took into consideration the specific needs of older persons, such as the IASC (Inter-Agency Standing Committee) Operational Guidelines on the Protection of Persons in Situations of Natural Disasters, the Peninsula Principles on Climate Displacement within States, and the Sendai Framework for Disaster Risk Reduction 2015-2030, which had been adopted at the Third United Nations World Conference on Disaster Risk Reduction, held in Sendai, Japan, from 14 to 18 March 2015.

12. In accordance with her mandate, the Independent Expert also continued to work in close coordination with the Open-ended Working Group on Ageing, and attended its sixth session, which was held in New York from 14 to 16 July 2015. As a member of the panel on recent policy developments and initiatives concerning the human rights of older persons, she provided an overview of positive initiatives and remaining challenges for the full enjoyment of all human rights by older persons.

III. Autonomy and care

13. It is estimated that by 2050 over 20 per cent of the world's population will be 60 years of age or older. While the increase in the number of older persons will be the greatest and the most rapid in the developing world, Asia is the region with the largest number of older persons, and Africa is facing the largest proportionate growth.

14. In 2011, the Secretary-General, in his report on the follow-up to the Second World Assembly on Ageing, stated:

> With this in mind, enhanced attention to the particular needs and challenges faced by many older people is clearly required. Just as important, however, is the essential contribution the majority of older men and women can continue to make to the functioning of society if adequate guarantees are in place. Human rights lie at the core of all efforts in this regard.[1]

[1] See A/66/173, para. 4.

15. Whereas older persons are often seen as a homogeneous group, this group is in fact the most heterogeneous of all age groups. Some persons may be in good health and may be able to live independently or autonomously throughout their lives; but others will become increasingly dependent on the help of others in old age for several reasons—such as illness, impairments or loss of mobility—and may require varying degrees of specific care.

16. Ensuring that older persons are in a position to lead autonomous lives to the greatest extent possible—irrespective of their physical, mental and other conditions—requires a radical change in the way society perceives ageing. There is a need to foster age-sensitive communities and age-friendly environments to help older persons retain their autonomy and be active, and be integrated effectively in all aspects of life.

17. It is therefore essential to move away from a needs-based and biomedical approach that focuses on disease and functional dependency to an all-encompassing human rights-based approach in which the enjoyment of all human rights by older persons becomes an integral part of all policies and programmes affecting them, including care planning and delivery.

18. Ageist attitudes still persist throughout the world, leading to discriminatory practices towards older persons, including in care settings. Age-based discrimination generates a lack of self-esteem and disempowerment, and undermines an older person's perception of autonomy. This is particularly true when they are in need of care to maintain or regain autonomy.

A. Legal framework

1. Autonomy

19. Autonomy is a core principle of the Convention on the Rights of Persons with Disabilities. Even though ageing should not be associated with disability, this legal framework could be applied to older persons with disabilities and could provide guidance on the scope of the concept of autonomy.

20. The Convention, in its preamble, recognizes the importance for persons with disabilities to have their individual autonomy and independence, including the freedom to make their own choices. Article 3 (a) refers to respect for inherent dignity and individual autonomy, including the freedom to make one's own choices, and the independence of persons.

21. The Convention also refers to autonomy in relation to health care and recovery from violence or abuse. Article 25 (b) requires that health services be designed to minimize and prevent further disabilities, including among children and older persons. Article 19 provides further guidance on measures that should be adopted to facilitate independent living and the full inclusion and participation of older persons with disabilities in the community.

22. The United Nations Principles for Older Persons refer to the principle of independence to describe the importance for older persons to have access to adequate food, water, shelter, clothing and health care, through the provision of income, family and community support and self-help. Older persons should also have the opportunity to find remunerated work or have access to education and training to allow them to live independently.

23. In accordance with the Principles, participation is to be understood as ensuring that older persons are actively involved in formulating and implementing policies that affect their well-being, sharing their knowledge and skills with younger generations, and being able to form movements and associations.

24. The section on self-fulfilment foresees that older persons should be able to pursue opportunities for their full development through having access to the educational, cultural,

spiritual and recreational resources of their societies. Autonomy is referred to in the Principles in relation to care.

25. The Madrid International Plan of Action on Ageing recommends, among other things, taking into account the needs and concerns of older persons in decision-making at all levels, including their participation in the labour market and in voluntary activities, access to knowledge, education and literacy, numeracy and technological training, and to social protection and security.

26. The Inter-American Convention on Protecting the Human Rights of Older Persons, which has recently been adopted and is open for ratification, includes, as core principles, the dignity, independence, proactivity and autonomy of older persons. For the first time, independence and autonomy are explicitly mentioned as rights per se, in article 7. This encompasses the right to make decisions, to determine a life plan, to lead an autonomous and independent life in keeping with traditions and beliefs. Article 11 further specifies the right to give free and informed consent on health matters.

27. Other non-binding instruments include the San José Charter on the Rights of Older Persons in Latin America and the Caribbean, which states in its preamble that the political, public and social participation of older persons is a fundamental human right, as well as respect for their autonomy and independence in decision-making. It also refers, in paragraph 7, to autonomy when addressing the right to free and informed prior consent for any medical intervention, regardless of age, health or treatment. The principle of autonomy is also addressed in reference to the need to create and guarantee the social services necessary to provide care for older persons, taking into account their specific characteristics and needs, and to promote their independence, autonomy and dignity. In paragraph 10, the Charter encourages the improvement of living conditions and environment to strengthen the autonomy and independence of older persons.

28. In Europe, the Charter of Fundamental Rights of the European Union, in article 25, calls on member States to recognize and respect the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life. In addition, the European Social Charter, in article 23, stipulates the right of elderly persons to social protection, enabling them, among other things, to choose their lifestyle freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of the provision of housing suited to their needs and state of health or of adequate support for adapting their housing.

29. More recently, the Council of Europe, in its recommendation on the promotion of human rights of older persons, made explicit references to autonomy. In particular, it stated that older persons are entitled to lead their lives independently, in a self-determined and autonomous manner. This means, inter alia, taking decisions independently on all issues that concern them, including in relation to property, income, finance, place of residence, health, medical treatment or care, and funeral arrangements.

30. In this regard, autonomy is understood in the Council of Europe recommendation on the promotion of human rights of older persons as including the right to participate fully in social, cultural, educational and training activities, as well as in public life; the right to privacy and family life; legal capacity and the right to receive appropriate support when making decisions and exercising their legal capacity should they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions and adopt safeguards in order to avoid abuses (see paras. 9-15).

31. The draft protocol to the African Charter on Human and People's Rights on the rights of older persons in Africa uses the term "independence" as a core principle. Article 3 provides that "States parties shall ensure that the principles of independence, dignity, self-fulfillment, participation and care of older persons are included in their national laws and are legally binding as the basis for ensuring their rights". Article 7, entitled "Right to make decisions", contains an implicit reference to autonomy by mentioning that States should

ensure that appropriate legislation exists that recognizes the rights of older persons to make decisions regarding their own well-being without undue interference from family and affiliated groups, and that older persons have the right to appoint a party of their choice to carry out their wishes and instructions.

2. Care

32. Care, in turn, has been referred to as part of the right to social security, including social insurance, and the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Article 25 (1) of the Universal Declaration of Human Rights states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Articles 9 and 12 of the International Covenant on Economic, Social and Cultural Rights refer to social security, including social insurance, and health care, respectively.

33. The United Nations Principles for Older Persons dedicate a specific section to the subject of care. They include references to family, community and institutional care, access to health care and to social and legal services to enhance the autonomy of older persons. They also stress that older persons should be able to enjoy their human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy, and for the right to make decisions about their care and the quality of their lives. There is no reference to the concept of self-care.

34. The Committee on Economic, Social and Cultural Rights interpreted the right to health in an inclusive manner, extending the concept not only to the provision of timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.

35. The Committee underlined the importance of the participation of the population in all health-related decision-making.[2] It also recommended that health policies should range from prevention and rehabilitation to the care of the terminally ill,[3] including periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining the functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.[4]

36. The Committee has further emphasized that the growing number of chronic, degenerative diseases and the high hospitalization costs involved cannot be dealt with only by curative treatment. In this regard, States should bear in mind that maintaining health into old age requires investments during the entire life span, basically through the adoption of healthy lifestyles. Prevention, through regular checks suited to the needs of the elderly, plays a decisive role, as does rehabilitation, by maintaining the functional capacities of elderly persons, with a resulting decrease in the cost of investments in health care and social services.[5]

---

[2] General comment No 14, para. 11.
[3] General comment No. 6, paras. 34-35.
[4] General comment No 14, para. 25.
[5] General comment No. 6, para. 35.

37. The Committee also noted that national policies should help older people to continue to live in their own homes as long as possible, through the restoration, development and improvement of homes and their adaptation to the ability of those persons to gain access to and use them.[6]

38. In addition, the Convention on the Rights of Persons with Disabilities includes the concept of "universal design", which may be of benefit to older persons. It is defined, in article 2, as the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design and develops State obligations regarding the promotion of the availability and use of universally designed goods, services, equipment and facilities.

39. The Madrid International Plan of Action on Ageing recommends the establishment of preventive and curative care, including rehabilitation and sexual health care, recognizing that health-promotion and disease-prevention activities throughout life need to focus on maintaining independence, on prevention, and on avoidance of delay in disease treatment, as well as on improving the health and quality of life of older persons who already have a disability.

40. Particular actions are encouraged to provide counsel and guide persons on healthy lifestyles and self-care.[7] Detailed actions are designed to further encourage the adoption of care measures that take into account age and the diversity of older persons, including primary care, acute care, rehabilitation, long-term and palliative care, self-care and gerontological services, provided both by formal and informal caregivers. Special attention is given to the importance of developing housing options for older persons that encourage and reduce barriers to independence, including in public spaces, transportation and other services.[8]

41. At the regional level, the African Charter on Human and Peoples' Rights recognizes the right to health and the role played by the family in society, and the right of older persons to special measures of protection in keeping with their physical or moral needs (arts. 16 and 18). The draft protocol to the Charter on the rights of older persons in Africa makes clear mention of care and support and access to health services, including in conflict and disaster situations. For instance, according to article 12, States should identify, promote and strengthen traditional support systems, including medical home based care, to enhance the ability of families and communities to care for older family members and adopt policies and legislation that provide incentives to all stakeholders including adult children, to support older persons in their communities, ensuring that they remain at home for as long as possible.

42. In the Americas, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights recognizes the right to social security and the right to health (arts. 9 and 10). Moreover, the Inter-American Convention on Protecting the Human Rights of Older Persons dedicates an article to the right of older persons to receive long-term care, while maintaining their independence and autonomy. A comprehensive approach to the right to health has been adopted in article 19, by including health promotion, prevention and care of disease at all stages, including rehabilitation and palliative care.

43. In Europe, the Council of Europe recommendation on the promotion of human rights of older persons dedicates a specific title to care, in which it recommends that States promote a multidimensional approach to health and social care for older persons and encourage cooperation among the competent services. It mentions several measures,

[6] Ibid., para. 33.

[7] Madrid International Plan of Action on Ageing, paras. 67 (d) and 105.

[8] Madrid International Plan of Action on Ageing, paras. 90 (f) and 98-100.

including training, consent to medical care and regulation of care delivery, in home, residential, institutional, long-term and palliative care.

B. Autonomy

1. Definition and scope

44. Autonomy refers to the principle or right of individuals or groups of individuals to determine their own rules and preferences. It includes the freedom and capacity to make one's own decisions and the legal capacity to exercise those decisions. Autonomy encompasses three main elements: an individual aspect, which includes the capacity to make decisions; an economic and financial aspect, understood as self-sufficiency and the ability to generate and receive income; and a societal aspect, which means the existence of communities and environments that are age-sensitive and age-friendly in order to ensure that older persons are able to decide or act for themselves.

45. The full enjoyment of autonomy has broad scope, including not only the right to equal recognition before the law, legal capacity, dignity, self-determination, empowerment and decision-making, but also the right to choose where to live, the right to work, the right to vote and to the right to participate actively in all spheres of society. The denial or restriction of legal capacity directly impacts the autonomy of older persons, as they will no longer be able to exercise these other rights, including making decisions regarding civil, commercial, administrative, judicial or health-related matters concerning their well-being.

46. Autonomy and independence are mutually reinforcing and are often used interchangeably in legal instruments and frameworks. While autonomy refers to the ability to exercise freedom of choice and control over decisions affecting one's life, including with the help of someone if needed, independence means to live in the community without assistance or, at least, where the amount of help does not subject older persons to the decisions of others. In that sense, the concept of independence is broader than autonomy, while autonomy may better reflect the reality of older persons, considering that with age, the need for assistance tends to increase.

2. Legal capacity and equal recognition before the law

47. Various tools exist to measure the degree of physical, cognitive and psychological autonomy, which take into account: mobility, communication and tasks performed on a daily basis to determine the degree of functional and mental autonomy of an older person. In terms of a human rights-based approach, however, the individual aspect of autonomy refers not only to functional autonomy but also mainly to the right to equal recognition before the law and legal capacity. This implies being recognized as a legal person before the law and having the ability to exercise rights as a legal person. Consequently, the will and preferences of older persons are respected, which allows for the exercise of free and informed consent. Older persons should therefore be consulted about and involved in any decision affecting their well-being.

48. Legal capacity is a key aspect of autonomy, allowing older persons to exercise civil, political, economic, social and cultural rights. In circumstances where an older person is partially or completely unable to look after their own interests because of a mental condition, such as dementia, or an extreme state of physical frailty, there may be a need for supported decision making. There is a need to ensure, however, that in such instances a person is not stripped of his or her legal capacity by guardianship measures, which remove their ability to make decisions about certain aspects of their lives. It is important to note in this regard that the Convention on the Rights of Persons with Disabilities provides that a person's status as a person with a disability or the existence of impairment must never be a ground for denying legal capacity. In its general comment No. 1 on article 12 of the Convention, the Committee on the Rights of Persons with Disabilities highlighted that the

Convention does not legitimatize the denial of legal capacity based on perceived or actual deficits in mental capacity.

49. The Independent Expert noted the positive trend in recent years to reform legal capacity and guardianship laws. General comment No.1 also provides guidance to States parties on reforming their current laws and legislation—in particular mental-health legislation that deprives persons with disabilities of their legal capacity—and encourages States to replace regimes that provide for substitute decision-making by supported decision-making.

50. Effective safeguards for ensuring the autonomy of older persons should be developed and implemented to ensure the respect of the rights, wishes and preferences of older persons and to avoid undue interference. The Committee on the Rights of Persons with Disabilities provides guidance on supportive measures, stressing that if, after significant efforts have been made, it is still not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations.[9] In addition, articles 11 and 30 of the Inter-American Convention on Protecting the Human Rights of Older Persons could also guide States on this issue.

51. Legal capacity has particular relevance for older persons regarding making fundamental decisions regarding their social and health care, in particular medical treatment. The respect for and the strengthening of older persons' autonomy in care settings means that they must be able to give consent to, refuse or choose an alternative medical intervention.

52. In his report on the fundamental role played by informed consent in respecting, protecting and fulfilling the right to health, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health highlighted that informed consent is not a mere acceptance of a medical intervention, but a voluntary and sufficiently informed decision, safeguarding the right of the patient to be involved in medical decision-making, and assigning associated duties and obligations to health-care providers.[10] Its ethical and legal normative justifications stem from its promotion of patient autonomy, self-determination, bodily integrity and well-being.[11] Older persons should therefore be encouraged to plan in advance any decisions regarding their care. Advance planning allows them to prevent abuses that often occur in older age.

3. Adequate standard of living and social protection

53. Living with autonomy is closely linked to the right to an adequate standard of living, social security, income security and an adequate public pension. The important role of social protection is recognized in several international and regional instruments and should be fully implemented and enforced in order to promote the autonomy of older persons.

54. Poverty contributes to the decline of older persons' autonomy and is an impediment to accessing adequate nutrition, water and sanitation, and social and health care. Not receiving a pension or not having insurance often inhibits older persons from seeking medical attention, putting them at a higher risk of social isolation and of being denied access to health care. Even for those who have insurance, there are delays in seeking public health care or obtaining prescription drugs because of the financial burden. Financial services, such as loans or mortgages, or insurance are often not available to older persons or are prohibitively expensive because of the inappropriate use of age as a criterion, including for determining risk.

---

[9] General comment No. 1, para. 21.
[10] See A/64/272.
[11] Ibid., para. 9.

55. Social transfers and pension schemes often account for the largest part of the resources of older persons and significantly reduce their at-risk-of poverty rate by ensuring some financial security.[12] They are thus an important factor in enabling older persons to live autonomously and not be dependent on intra-family transfers or any other private income. Access to social insurance schemes and pensions, particularly for women, rural workers, and persons who worked in the informal sector, is essential for persons to live an autonomous life when they become old.

56. The Independent Expert strongly encourages the review of austerity measures and fiscal consolidation programmes, especially those which may negatively impact the economic and financial autonomy of older persons by increasing the risk of poverty, exclusion and insecurity in old age. Social protection should be strengthened, both contributory and non-contributory schemes, by increasing resources, improving the availability of and access to services, through communication and by removing any obstacles to receiving the benefits.

4. Right to work

57. It is also important to ensure the right to work by fostering the active economic participation of older persons as long as they are willing or able. Older persons have much to contribute, based on the considerable skills, wisdom, expertise and experience they have acquired throughout their professional life, and they should be encouraged to continue working if they wish. Therefore, workplaces and job options that include older workers should be developed, as well as voluntary work. Older persons have indispensable roles in assisting peers and participating in intergenerational activities by helping younger generations, and by contributing to the education of grandchildren. This will help reinforce social cohesion and the interaction of older persons with other members of the community.

5. Right to adequate housing and accessibility

58. Age-sensitive communities and age-friendly environments are preconditions for older persons to live with autonomy and remain integrated in society. Older persons should be able to live in environments that are safe and adaptable to their personal preferences and changing capacities. The environment should therefore be adapted to their needs. This should include, for instance, outdoor and public spaces, the physical environment, buildings, transportation, social participation and inclusion, civic participation and employment, information and communications and other facilities and services in both urban and rural areas.

59. Physical barriers significantly undermine the autonomy of older persons and deny them access to basic services, including health care. When older persons are unable to drive, the lack of public transport, especially in rural and remote areas, presents serious challenges. Even if they are able to access public transport, older persons still require a reasonable level of physical fitness, the competence to follow bus-route directions, the ability to endure long rides and bus transfers, and a safe environment to wait and to walk in.

60. Accessibility encompasses access to infrastructure, buildings, transportation, information and care settings in urban and rural areas. States should provide comprehensive barrier-free accessibility environments and work towards eliminating existing barriers. Public buildings, facilities, roads and transportation should be easily accessible. For this to occur, revisions to building control acts and urban planning codes, with the inclusion of standards of universal design in a variety of sectors and facilities, may be needed. States should also provide training to all stakeholders involved in adapting public spaces to

[12] A/HRC/14/31.

demographic changes: including engineers, designers, architects, urban planners, transport authorities and conductors, service providers and members of the academic community.

61. Another important element to leading an autonomous life is housing. Older persons have the right to choose where to live, and, to the extent possible, housing should be adapted to their needs. Should they wish If they feel the need to change or adapt their homes because of their mobility requirements. States should secure rent- free accommodation, or at least provide rent subsidies or , credit facilities , to help older persons afford to remain in their own houses.

62. Housing options for older persons, including co-housing based on intergenerational communities, age-adapted homes and flat-sharing concepts should be further developed. Other schemes that include bank credit facilitation, tax incentives and subsidies, involving both private and public sectors should be encouraged so as to build accessible and appropriate housing for older persons. Particular attention should be given to older women and widows, who tend to live alone with no family support.

6. Participation and social inclusion

63. An age-friendly community is one that also considers an older person's political involvement, meaning that age cannot be a justification for any exclusion from decision-making processes and active citizenship. The right to participate in political and public life includes the possibility of being able to vote, and of being elected, sometimes requiring the availability of facilities and materials that are accessible to older persons, including in nursing and institutional care settings. States should provide access to transport to and from polling stations, as well as to attend meetings of public authorities and to participate in trade-union and advocacy efforts.

64. The involvement of older persons in the electoral system has been declining, especially in the age group of 80 and above, as a result of discriminatory practices leading to social exclusion and political marginalization. The participation of older persons should therefore be institutionalized through forums, or consultative, coordinating or advisory bodies at the local, regional and national level.

7. Education, training and lifelong learning

65. Autonomy includes access to education, training and lifelong learning that will help maintain self-esteem and extend knowledge and adaptability to cultural and social changes, especially regarding advances in information technology. The target of educational programmes should not be limited to older persons only, in order to promote inter-generational learning and understanding. States should develop specific pedagogical methods for teaching older persons, such as master's degree programmes in geronto-pedagogics. Particular attention should be given to information technology and computing training programmes.

66. With the rapid evolution of new technologies, autonomy also means having access to the Internet and being able to use information and communications technology and services. When online registration is sometimes the only or easiest way to purchase goods and services, older persons should be able to access these goods and services without depending on others. Older persons constitute a distinct consumer group, with specific needs, interests and preferences. Technologies can contribute to strengthening an older person's autonomy by adapting products to meet the changes incurred with age, such as through adjusting the size of objects or through offering technical support.

67. Autonomy also means being able to access cultural activities through the availability of transport, subsidized tickets for cultural activities and reduced fees or free entrance for older persons. Services such as closed-captioning and open subtitled for those with hearing impairments should be provided in theatres, museums and other cultural-related facilities.

8. Right to health

68. In care settings, autonomy means that older persons are able to participate in the formulation, monitoring and evaluation of their care services, as well as in clinical trials in order to determine the effect of medication.[13] Older persons should no longer be seen as passive recipients of care but as active users.[14] This change of paradigm from passive to active care is a shift from care provided for people to care provided with people.[15]

69. Older persons should receive health education, and information on the social and health-care services available to them, on their rights in care settings. They should also receive guidance on adequate nutrition and on different pathologies, including communicable and non-communicable diseases. In this context, self-care can help older persons to participate actively in and manage their own health.

C. Care

1. Definition and scope

70. There is no universally accepted definition of care.[16] Care aims at maintaining or regaining the optimum level of physical, mental and emotional wellbeing and to prevent or delay the onset of disease. While a distinction is generally made between social and health care, depending on where and by whom such services are provided, care should be understood in a complementary and integrated manner for the benefit of older persons. It comprises a range of services, facilities, knowledge and support aimed at increasing the individual's physical, mental and social well-being, provided either by formal or informal carers, and through the public or the private sector.

71. Care encompasses services such as assistance with the activities of daily life, social income, protection and security, as well as health promotion and disease prevention, treatment and rehabilitation and the provision of primary, secondary and tertiary health care, in ambulatory, institutional or home settings. Equality of access to social and health care throughout the life of older persons is also the basis of an autonomous life and active and healthy ageing.

2. Care settings

72. Home and family care is the most common form of care for older persons in many countries, where care of older persons is regarded very much seen as the responsibility of the family. While for many older persons, family care is the preferred option in old age, there is a need for adequate parallel support to family members and other informal caregivers. This would include respite care services, needs assessment, counselling and advice, self-support groups and practical training in care-giving, as well as information about measures to protect carers' own physical and mental health, weekend breaks, and integrated planning of care for older persons and families. Including family carers into the social security system is particularly important given that caregivers are often women who are not gainfully employed and in view of the increasing need for care in ageing societies.

---

[13] See A/HRC/18/37, para. 16.

[14] Economic Commission for Europe policy brief on ageing No. 15, "Innovative and empowering strategies for care" (2015), p. 5.

[15] Ibid.

[16] World Health Organization glossary of terms for community health care and services for older persons (2004). The glossary (www.who.int/kobe_centre/ageing/ahp_vol5_glossary.pdf) could provide guidance on the scope of "social care", "health care", "acute health care", "ambulatory care", "long-term care", "home care or domiciliary care", "adult care homes", "day care centres", "hospice care", "palliative care", "residential care" and "formal and informal caregivers".

73. The Independent Expert emphasizes that the assistance provided by family members and communities cannot substitute for States' obligations to promote and protect all human rights of older persons. She also notes the radical changes some societies are undergoing, such as changes in family patterns or lifestyles, as well as challenges related to migration and urbanization, which need to be taken into account.

74. The institutionalization of care, while it can be the result of an autonomous decision of a person as he or she becomes older, can often take the form of forced institutionalization and compulsory placements, especially when no other forms of care are available for the individual or when relatives are unable or unwilling to provide care.[17] When proper legal and institutional mechanisms and procedures are in place in care settings, thus ensuring freedom of choice and informed consent, older persons in need of care can lead a life with dignity. It is therefore crucial to ensure older persons' autonomy, in particular when it comes to any decision-making affecting their care.

75. Flexible and open care institutions have been established in several countries in order to avoid such institutionalization, with free provision of medical home care, including administration of medication and infusions. Such services have improved the quality of life of older persons by enabling them to stay at home.

3. Quality control and accessibility

76. Ensuring quality control in care settings is one of the main challenges. It has been pointed out that the office hours of social and health-care services were often anti-social and to the disadvantage of older persons. For example, older persons are often required to arrive early in the morning and queue to receive a number that will correspond to their attendance. Such an approach results in long waits in uncomfortable and even inhumane conditions, with a lack of appropriate assistance that takes into account their specific needs. Associated with this, is the shortage of social and health-care professionals with formal education in geriatrics and gerontology, and with gender and disability-based expertise.

77. Most health-care undergraduate programmes do not include geriatric and gerontology in their curricula, with the result that health-care professionals are not fully trained to help and understand older persons. For older persons who do not have family or community support, having to rely exclusively on formal caregivers without such training or qualifications can make their lives particularly difficult.

78. The fragmentation of care also causes problems owing to the co-existence of many units that are not integrated into the network of services, and which results in hours spent in filling complicated forms to access both social and health-care services and facilities. It also results in poor quality service provision, inefficient use of available resources and low user satisfaction. This may often be due to the lack of coordination between the different levels and places of care, especially in hospitals. Consequently, older users experience a lack of continuity in care, together with a lack of consistency in the provision of services for meeting their needs.

79. Equitable access to health services is another challenge faced by many countries. Care facilities, goods and related services need to be made available, accessible, affordable and acceptable, and be of good quality for all older persons. There is a need to ensure that these all older persons have access to the same services irrespective of the type of care and the place of residence, including in urban, rural and remote areas. In this connection, older persons may require access to transportation, information and communication on care-related programmes and facilities that meet their requirements and needs.

[17] See E/2012/51, para. 25.

80. Care work is often characterized by a heavy workload, long working hours and emotional exhaustion; and care workers tend to be undervalued, underpaid and undertrained. There is evidence that the satisfaction of persons receiving care correlates with the well-being of their care workers.

4. Elder abuse and violence against older persons

81. Abuse of and violence against older persons in home and institutional care settings, by both formal and informal caregivers, is still a taboo subject in many countries and an underreported problem. These older persons may be subjected to intimidation, aggression, inappropriate behaviour-control methods, negligence, or a failure to provide the appropriate or necessary care, among other forms of ill-treatment.

82. Risk factors for abuse and violence in care settings may relate to institutional aspects, such as poorly trained staff, also as a result of a lack of career prospects and high turnover, as well as a culture of tolerance of aggression towards patients.

83. Regular inspection and monitoring of home visits by certified care workers is necessary to ensure adequate quality of care and the protection of older persons, including against physical and mental violence, and from degrading treatment and neglect.

84. Certain countries have implemented technical services provided by public prosecutors to help older persons who are involuntarily hospitalized or involuntarily receiving medical treatment. Offices of an ombudsperson have also been created to support older persons in expressing their needs and decisions, and to seek remedy.[18] In care facilities, committees composed of older persons have been put in place to supervise and evaluate the quality of the services, especially regarding food, hygiene and interaction with staff.

5. Geriatric services and palliative care

85. Older persons have different patterns of disease presentation than younger adults, they respond to treatments and therapies in different ways, and they frequently have complex social needs that are related to their chronic medical conditions. It is therefore important to ensure that sufficient doctors, staff and others qualified in geriatric health are available to ensure that these older persons can fully enjoy their right to health.

86. Particular attention needs to be given to palliative care. In certain countries, this is not officially recognized as a medical speciality and the medicine used in such care is limited, for several reasons, including restrictive drug regulations, failure to implement a properly functioning supply and distribution system, and inadequate health-care system capacity.

87. The Independent Expert stresses that the Special Rapporteur on the right to health and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment qualified the failure to ensure access to controlled medicines for the relief of pain and suffering as a threat to the fundamental right to health and the right to be free from cruel, inhuman and degrading treatment.[19]

6. Groups in focus

88. Particular attention should be given to specific groups of older persons when designing and implementing care policies, goods and services, in particular older women,

[18] Economic Commission for Latin America and the Caribbean. *Autonomía y dignidad en la vejez: Teoría y práctica en políticas de derechos de las personas mayores*, pp. 82-83. Available from http://repositorio.cepal.org/bitstream/handle/11362/37523/S1421014_es.pdf?sequence=1

[19] A/HRC/22/53.

older persons with disabilities, and persons with chronic illnesses, non-communicable diseases and dementia. Gender, disability and cultural sensitivities should be promoted in care settings to allow older persons from different backgrounds to be informed effectively and to be able to make decisions. Specialized integrated social and health-care services should be developed and implemented to address dementia and other degenerative diseases that lead to dependency.

IV. Conclusions and recommendations

A. Conclusions

89. **In the light of the intensity of ageing in many societies, there is a need to ensure that older persons are enabled to lead autonomous lives. This also calls for a paradigm shift that focuses on the inclusion of older persons in society at all levels, encompassing age-friendly communities and environments, as well as people-centred models of care, and that promotes the autonomy and dignity of older persons.**

90. **The design, implementation, monitoring and evaluation of any social and health-care legislation, policies, programmes, strategies and settings must take into account the respect for and the strengthening of older persons' autonomy. To promote this autonomy, effective care for older persons needs to integrate economic, physical, mental, social, spiritual and environmental factors.**

91. **The increasing prevalence of chronic and degenerative diseases in older age poses challenges to the development and implementation of appropriate models of care for older persons. The disease-focused approach in care at different levels needs to be replaced by more effective and rights-based models in order to address the specific needs of the most heterogeneous of all age groups.**

B. Recommendations

92. **With a view to assisting States in developing and implementing appropriate and effective measures to ensure the autonomy of older persons, including in social and health-care settings, the Independent Expert makes the recommendations set out below.**

Legal, institutional and policy framework

93. **States must fully comply with their international obligations relating to autonomy and care. The Independent Expert strongly encourages States to ratify all the core human rights treaties, including the Convention on the Rights of Persons with Disabilities, as well as all relevant regional instruments —notably the recently adopted Inter-American Convention on the Human Rights of Older Persons, which makes explicit reference to autonomy and care.**

94. **States should design and implement effectively national policies and action plans on ageing that include specific provisions on autonomy and care, in a comprehensive and intersectoral manner.**

95. **States should establish national councils on ageing, with older persons among its members, to design and develop policies, including care, that correspond to their needs and respect their autonomy. Such councils should guarantee pluralism, represent the diversity of older persons and receive sufficient funding so that they can function properly and effectively.**

Study and statistics

96. **States should ensure, nationwide, systemic and regular collection of disaggregated statistical data, and carry out studies to assess the situation and needs of older persons and develop targeted policies for older persons. Data must be used sensibly to avoid stigmatization and potential misuse. Particular care should be exercised when collecting and analysing data in order to respect and enforce data protection and privacy. Older persons, including the very old and those in institutionalized care settings, should systematically be included in surveys and official statistics, in order to ensure a better differentiation for age and to better reflect the broad heterogeneity of older persons.**

97. **States should constantly conduct researches and studies and collect age- and gender-disaggregated data on abuse and violence against older persons in and outside care settings in order to assess the current situation and take appropriate measures to tackle elder abuse.**

Discrimination, abuse and violence

98. **There is a need for national anti-discrimination strategies addressing discrimination in a coherent and multifaceted way. States should, through legislation, prohibit direct or indirect discrimination against older persons, including in the financial and insurance services sectors, as well as in care settings.**

Legal capacity and equal recognition before the law

99. **The Independent Expert emphasizes that supported decision-making for persons with intellectual or psychosocial disabilities, including older persons, is essential for the respect of the autonomy of older persons and their individual rights, in their own capacity to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work and to choose their place of residence. Judges should be guided by the objective of ensuring that older persons can lead a self-determined and autonomous life for as long as possible.**

100. **Older persons must be provided with guarantees to ensure that their preferences, their will and their best interests are taken into consideration in all matters relevant to their life, including treatment, residence or assets. Conflict of interest and undue influence should be regulated, especially in reference to family members and caregivers.**

101. **Safeguards to free and informed consent should be adopted through legislation, policies and administrative procedures in conformity with international and regional standards. Particular attention should be given to illiterate older persons or persons with less formal education.**

Adequate standard of living and social protection

102. **States must recognize the human right to social security in domestic law. Non-contributory and contributory pension schemes must be guided by international human rights standards for the right to social security.**

103. **States should put in place social-protection and poverty-reduction programmes, particularly designed for older persons, including those with disabilities. Human rights principles and standards should be integrated throughout the design, implementation and evaluation of social pensions, thereby ensuring that older persons fully enjoy their human rights.**

104. **The Independent Expert recalls that the right to social security includes both contributory and non-contributory benefits and benefits both in cash and in kind, and that benefits should be adequate in amount and duration and accessible to all without**

discrimination. Non-contributory old-age benefits or other assistance should be provided for those without resources on reaching old age, with special attention to be given to older persons working in the informal sectors, older women, older widows, and those living in rural and remote areas.

105. In the light of the significant contribution of social transfers and pension schemes, austerity measures and fiscal consolidation programmes should be revised in order to ensure the provision of basic income to older persons, together with adequate social and health-care services and support.

106. A thorough evidence-based analysis of the current and future needs of various forms of care or affordable, accessible and barrier-free housing is essential for meeting the immediate needs and for planning and preparing for the future and for developing appropriate measures to ensure an inclusive society for all ages.

Right to work

107. States should introduce incentives for employers and employees to extend people's working lives beyond the mandatory retirement age. Workplace environments and working conditions should be adapted to older workers by introducing flexible working arrangements, including phased retirement. The Independent Expert also points out the importance of continued education and access to new technologies, as well as vocational rehabilitation. States should ensure that social security and pension systems do not penalize older workers who choose to work beyond normal retirement age.

108. The contribution of older persons should be recognized and encouraged, including, but not limited to, their role in the care of family members, in household maintenance and in voluntary and associative activities.

Right to adequate housing and accessibility

109. States should adopt housing policies that take into account the special needs of older persons to enable these persons to live autonomously. Ageing at home requires innovations in the housing sector, including alternative forms of housing for older persons, such as mixed and designated communities and age-adapted homes, or flat-sharing concepts that promote intergenerational interaction. Alternative forms of housing and the possibility to adapt their homes should ensure that older persons can remain in their homes and lead autonomous lives.

110. States should establish tax incentives and subsidies to encourage developers to build accessible and appropriate housing for older persons. Credit facilities should also be encouraged in public and private banks to allow older persons to adapt their homes or to become homeowners. In view of the difficulties often faced by older persons in accessing financial and insurance services and resources, the Independent Expert wishes to remind businesses of their obligations to adhere to international standards preventing, inter alia, all forms of discrimination and to the Guiding Principles on Business and Human Rights, which provide guidance on responsible contracting and State-investor contract negotiations.

111. Given that the physical ability, individual characteristics and the transport environment crucially influence the mobility of older persons, States are encouraged to adopt comprehensive national accessibility policies. There is also a need to include mandatory provisions demanding the implementation of barrier-free access. States should also ensure the elimination of existing barriers in public spaces and buildings, including in care settings. The Independent Expert recommends that architects and engineers apply a human rights-based approach in designing public and private buildings.

112. States should ensure older persons' mobility, including affordable and accessible public transport, both in urban, rural and remote areas. This could encompass free or discounted transport, low-floor buses and trains, and facilities to help older persons purchase tickets online or in person.

Education, training and lifelong learning

113. The promotion of lifelong learning is essential for older persons to be able to deal with constantly changing circumstances, requirements and challenges, for their active participation in society and for an autonomous life continuing into old age. The specific needs of older persons should be taken into account in the planning and design of educational offers.

114. Distance learning and digital training should be offered to older persons in order to bridge the gap among generations and avoid dependency on others as a result of to the lack of knowledge of information and communications technology.

Care

115. States should improve coordination among sectors throughout the continuum of care, from prevention, promotion, rehabilitation, through to long-term and palliative care, including social care and other community services, and prevent unnecessary institutionalization. Universal coverage and uniform national legislation should be introduced in order to avoid fragmentation of social and health services.

116. Older persons should be included in the design, planning, implementation and evaluation of care, be these social or health-related services and facilities. Gender, disability and cultural-sensitivity programmes should be integrated in every care setting in order to take into account the diversity of older persons and meet their requirements and needs.

117. States should provide assistance to families and to other informal caregivers. This should include human rights, medical and human resources training, counselling, and financial, social and psychological support. States should strengthen mechanisms to officially recognize the work undertaken by informal caregivers, including, as appropriate, work permits that allow flexible schedules in order to combine paid work with informal care of older persons, as well as their inclusion in the social security system. Particular attention should be given to older women in their role as caregivers.

118. States should develop national home-care programmes and community-based care services, in rural and remote areas alike. Such programmes and services should be designed and implemented in consultation with the older persons themselves and their families.

119. States should provide long-term care through a comprehensive and intersectoral approach, and promote the transfer of older persons from an institutional to a community-care residence and home, if the older person so wishes.

120. States should develop training programmes to improve the self-care of older persons. Older patient education may include health education and awareness of pathologies, thereby increasing self-esteem and confidence.

121. As forced institutionalization violates the rights of older persons, States should revise their legislation and regulations, in particular with regard to mental health-care settings. A clear set of standards should be established on free informed consent in care settings, in particular in mental health-care settings.

122. Residential councils that include older persons should be established in institutional care settings to promote the active participation of these persons in the organization of their own daily activities.

123. States should establish quality monitoring and effective and transparent accountability mechanisms for public and private care settings, which take into account older persons' assessments and evaluations. This requires establishing clearly defined benchmarks, such as codes of practices and conduct, and where conformity can be assessed and verified by sufficient and well-trained staff both in home and institutionalized care settings.

124. Quality care is also correlated with the working conditions and well-being of care workers. In order to ensure that care workers provide care that meets the emotional and physical needs of older persons with compassion and dignity, and in order to attract people into the care sector and retain them there, better training opportunities, including academic qualifications, should be provided. This, in turn, will also help portray care work as a profession with good career prospects.

125. Given the multidimensionality of abuse and violence against older persons, there is a need to adopt a comprehensive, integrated and inclusive approach involving different disciplines, organizations and actors, as well as older persons themselves, in identifying appropriate responses to abuse and violence.

126. States should adopt legislation and policies to prevent, detect, investigate, prosecute and criminalize elder abuse. Procedures must be in place for reporting abuse and violence, including in public and private care settings. The Independent Expert calls on States to pay particular attention to protecting victims from retaliation, especially in cases where the abuse or violence is committed by a family member, relative or is the result of an intimate relationship.

127. Collective prejudice against older people and general public awareness influence the way in which abuse and violence is perceived, recognized and reported. States should devise an awareness-raising strategy regarding the issue of abuse of and violence against older persons. Awareness-raising campaigns should not only target older persons themselves, but also their social environment, such as family, friends and caregivers. They should also target employees in homes and institutions, doctors, nurses and caregivers and the broader communities.

128. Information about remedies, referral pathways and available services should be made widely available to older persons and the broader public domain, and particularly the social environment of older persons. Dissemination of information to older persons about their rights could help to further improve disclosure about abusive experiences and make more effective the implementation of laws related to elder abuse when such laws exist. Caregivers and law enforcement personnel should receive training to recognize and handle cases of abuse and violence against older persons.

129. States should develop ombudsman-like positions inside institutionalized care settings that could improve older persons' care and quality of life and denounce cases of abuse and violence, including health-care fraud.

130. Older persons have different patterns of disease presentation from younger adults, they respond to treatments and therapies in different ways and they frequently have complex social needs that are related to their chronic medical conditions. States should therefore ensure the availability of geriatric and gerontological specialists in different types of care services and facilities. There is a need to further promote geriatric medicine to ensure that a sufficient number of qualified geriatrics are available to meet the needs of an ageing society.

131. **The right to palliative care should be enshrined in the legal framework so that older persons can enjoy the last years of their lives in dignity and without unnecessary suffering. States should ensure the availability and accessibility of palliative care for all older persons in need, particularly those who suffer from a life-threatening or life-limiting illness. Training, and adequate and affordable medication and therapeutic measures, should be provided in public and private care settings.**

132. **Innovative care for older persons with chronic and degenerative diseases, such as dementia, should be encouraged through public and private partnerships, including scientific and academic sectors, in order to improve the quality of life and well-being of those affected.**

United Nations A/HRC/30/43/Add.1

General Assembly

Distr.: General
4 August 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte

Addendum

Mission to Slovenia*

Summary

In the present report, the Independent Expert on the enjoyment of all human rights by older persons presents the findings of her visit to Slovenia from 17 to 21 November 2014. The main objective was to identify both best practices and gaps in the implementation of existing laws related to the promotion and protection of the rights of older persons. She also assessed the implementation of existing international instruments as well as law and policies pertaining to the enjoyment of all human rights by older persons in Slovenia. Based on information gathered prior to, during and after the visit, the Independent Expert analysed the challenges faced in the realization of all human rights by older persons, paying particular attention to ostracized persons and groups. She also examined measures to foster the implementation of existing law and policies that could contribute to the promotion and protection of the rights of older persons.

* The summary of the present report is circulated in all official languages. The report itself, which is annexed to the summary, is circulated in the language of submission only.

GE.15-13136(E)

Please recycle

Annex

[English only]

Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, on her mission to Slovenia

I. Introduction

1. Pursuant to Human Rights Council resolution 24/20, the Independent Expert on the enjoyment of all human rights by older persons conducted an official visit to Slovenia from 17 to 21 November 2014, at the invitation of the Government. The purpose of the visit was to identify best practices and gaps in the implementation of existing law related to the promotion and protection of the rights of older persons in the country. During her visit, the Independent Expert had the chance to meet government representatives, non-governmental organizations and others working with and on the issue of older persons. The Independent Expert thanks the Government of Slovenia for extending an invitation to her and for its cooperation throughout the visit.

II. Background and context

2. Older persons in Slovenia represent a significant and rapidly growing sector of society. The proportion of older persons stagnated in the 1980s at around 10 per cent, but has continuously grown since 1987 and in mid-2009 exceeded 16 per cent of a population of slightly more than 2 million people. It is projected that, by 2060, the proportion of older persons in Slovenia will increase to 33.4 per cent of the total population. This will represent one of the highest proportions of older people per population in the region.

3. The proportion of persons aged 80 or more is expected to increase to 14 per cent, as compared to 3.5 percent in 2008. Fastest is the increase in the proportion and number of persons aged 85 or more. In 1989, they numbered slightly fewer than 15,000, but by 2009 their number had more than doubled and, according to the projection, it will increase by fivefold by 2050, by which time they will constitute 7.6 per cent of the total population.

4. The overall assessment of the situation of older persons in Slovenia shows a mixed picture. According to the Global AgeWatch Index,[1] Slovenia provides an enabling environment for older persons, which refers to social connections, physical safety, civic freedom and access to public transport. The health status of the country's older persons is average; however, Slovenia ranks particularly low with respect to capability, as a result of the low employment rate of older people, despite many older workers having completed secondary or tertiary education.

[1] See www.helpage.org/global-agewatch/population-ageing-data/country-ageing-data/?country=Slovenia

III. Legal, institutional and policy framework

5. Slovenia has ratified several international treaties that are of relevance to older persons. It is party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto, and the Convention on the Rights of Persons with Disabilities.

6. The national legislation in place in Slovenia prohibits discrimination, including on the grounds of age and disability. The prohibition of discrimination and the principle of equality are guaranteed in the Constitution and, in article 14 thereof, everyone is guaranteed equal human rights and fundamental freedoms irrespective of, inter alia, social status, disability or any other personal circumstance. As a member of the European Union, Slovenia in 2004 adopted the Act Implementing the Principle of Equal Treatment, which was further amended in 2007, as an umbrella anti-discrimination law to transpose related European Union law into national legislation.

7. Several ministries are responsible for older persons. The Ministry of Labour, Family, Social Affairs and Equal Opportunities is the main government ministry in charge of social welfare matters for older persons in Slovenia. It has a specific department dedicated to older persons and, together with the Ministry of Health, coordinates the provision of nursing homes for older persons and persons with disabilities. It is also in charge of long-term and social care. The Social Protection Institute of Slovenia is the central body that provides the Ministry of Labour, Family, Social Affairs and Equal Opportunities with periodic information on social care issues and evaluates the effectiveness of measures taken and assesses existing policies. The activities of the Ministry of Health relate to health and health-financing matters at the primary, secondary and tertiary levels.

8. Several policies and programmes are in place that deal with the situation of older persons. In February 2013, Slovenia adopted the new National Social Protection Programme 2013-2020, one of the goals of which is to provide support to the family and social networks caring for people in need of help.

9. Also in 2006, Slovenia adopted the Strategy of Care for the Elderly until 2010 entitled "Solidarity, Good Intergenerational Relations and Quality Ageing of the Population", with a view to developing and broadening models of support for families with older members, new programmes of care for older persons with individual solutions and others supporting social networks for quality ageing and the coexistence of generations. Implementation of the strategy is monitored by the National Council for Solidarity and Coexistence of Generations, established in 2007, which seeks to bring together all relevant government departments, experts working with older persons, non-governmental organizations and representatives of older persons. The Independent Expert was pleased to learn that a new Strategy for Quality Ageing, Solidarity and Coexistence of Generations in Slovenia by 2020 was currently being developed and that it will place further emphasis on the concept of quality ageing covering the broadest spectrum of active and healthy ageing possible and intergenerational solidarity.

10. Measures to promote active ageing were adopted in 2010 by the Government, and include ones to promote employment and foster lifelong learning, and awareness-raising campaigns and promotion of health at work. A comprehensive active ageing strategy is

anticipated in the near future on the basis of recent studies and evaluation of the situation of the elderly in the labour market.

IV. Independent Expert's main findings

A. Discrimination

1. Roma

11. While Slovenia is among the European countries with the most pronounced ageing of population, this ageing intensity has not reached the Roma population: of the 3,246 self-declared Roma in 2002,[2] only 73 were older than 65 years of age according to official statistics.

12. Under article 65 of the Constitution of Slovenia, the status and special rights of the Roma community living in Slovenia shall be regulated by law.[3] In the Roma Community in the Republic of Slovenia Act, which entered into force in April 2007, the framework for protecting the rights of Roma people in Slovenia, especially rights related to education, work and preservation of the Romani language, is laid out. The Roma Community Council of the Republic of Slovenia, which is intended to represent Roma interests in relation to State institutions, is also established under the Act.

13. Discrimination against Roma in Slovenia remains widespread. Most Roma people still live apart from the majority of the population, in isolated settlements, which are generally below the minimum living standards, or on the periphery of larger towns. About 10 per cent of Roma settlements are situated in hazardous areas and many lack access to water and sanitation and other basic services.

14. The Independent Expert acknowledged the efforts undertaken by the Government, such as the National Programme of Measures for Roma 2010-2015, which was adopted in March 2010 and is aimed at, inter alia, improving the living conditions of the Roma community. She noted, however, that immediate targeted measures are needed to increase the life expectancy of Roma and to end the segregation affecting them across the board.

2. "The erased"

15. The persons known as "the erased" are a group of around 25,000 former Yugoslav nationals[4] who were stripped of their legal status in the wake of the independence of Slovenia. Their personal data were unlawfully transferred from a register of people with permanent residence to a register of people with no legal status in Slovenia, as they did not apply for Slovenian citizenship within the six-month deadline set by the Citizenship of the Republic of Slovenia Act of 1991. This procedure later became known as "erasure" and was found unlawful by the Constitutional Court of Slovenia in 1999. That decision was confirmed by the Constitutional Court in 2003.

---

[2] Official statistics report that some 3,000 Roma people live in Slovenia, although other estimates put the number as high as 10,000. See Peace Institute, Institute for Contemporary Social and Political Studies, thematic study by the RAXEN National Focal Point of Slovenia on housing conditions of Roma and Travellers (2009), p. 5. Available from http://fra.europa.eu/fraWebsite/attachments/RAXEN-Roma%20Housing-Slovenia_en.pdf.

[3] A translation of the Constitution is available from www.us-rs.si/en/about-the-court/legal-basis/.

[4] For more information, see www.mnz.gov.si/en/services/the_erased/.

16. Erasure seriously affected and affects the situation of those concerned, including older persons. The loss of the legal status entailed the loss of jobs, the inability to access employment, free health care, unemployment or other social benefits. The erased were evicted and lost their housing rights and, as a consequence, became homeless and faced difficulties obtaining their retirement or disability pensions.

17. The Act on Changes and Amendments to the Act governing the Status of the Citizens from other Successor States to the former Socialist Federal Republic of Yugoslavia living in Slovenia and the Act on arranging the Status of the Citizens from other Successor States to the former Socialist Federal Republic of Yugoslavia living in Slovenia, which were enacted in 2010, addressed the issue of the erased population and offered an avenue for the erased to restore their legal status.

18. When the erased looked to the new legislative measures, it became clear they were faced with an extremely complex procedure in which the burden of proof rested entirely with the plaintiff. About 12,000 erased had had their status restored by 2013. A further 1,302 of the erased had died by 2009.

19. Further to a judgement of the European Court of Human Rights in June 2012,[5] new legislation was adopted in December 2013, creating a compensation scheme for those whose status had been regularized. Yet, despite a number of positive measures, there is an urgent need to guarantee the rights of the dwindling number of former permanent residents of Slovenia.

B. Violence and abuse

20. The Family Violence Prevention Act of 2008 encompasses elder abuse as a specific violation. Article 3 applies to instances where a person does not provide due care for the family member in need due to old age. Furthermore, under article 4, special care and assistance is provided for victims who are older or with disabilities. Finally, article 193 of the Criminal Code stipulates that whoever seriously breaches family legal obligations by leaving a member of his or her family who depends on him or her in dire straits shall be sentenced to imprisonment for up to two years.

21. Elder abuse is a recognized problem in Slovenia. About 5,000 crimes against older persons are recorded each year by the police. The most common forms of violence are neglect and physical and psychological abuse, which includes humiliation and denial of contact with other people. Financial abuse includes theft, misuse of credit cards and the forcing of older people to sign contracts and wills.

22. Elderly women in particular are often victims of their families, institutions and their social environment. They are particularly vulnerable to partner abuse because many of them do not have their own pensions, they are less informed and they do not have contact with local political or social institutions.

23. Many older persons are afraid to speak out, as they fear reprisals from family members when launching official complaints and having to testify in a judicial process, which leads to underreporting of abuse cases. The lack of knowledge and awareness about their rights is another reason for the low number of complaints.

24. Many cases of violence also stay undetected owing to the abandonment and loneliness of older persons. The project "Elderly people improving the quality of their lives and the lives of their peers with voluntary work (Elderly for Elderly)" creates a system

[5] European Court of Human Rights, *Kurić and Others v. Slovenia*, application No. 26828/06.

whereby older volunteers visit older persons in their neighborhood to identify their needs and direct them to the necessary information and assistance services. The project specifically targets those older persons who have no contact with others and stay at home, and has an important role in reporting cases of violence or abuse to the centres for social work. Since 2008, volunteers have identified 205 cases of abuse or violence among older persons living at home.

C. Adequate standard of living for older persons

25. While in 2011 less than 12 per cent of the population in Slovenia was at risk of poverty or social exclusion, which is a lower proportion than the European average of 15 per cent, the poverty risk for older people aged 65 or more is significantly higher at over 20 per cent. Single older women are at substantially higher risk of poverty than single older men.[6] Social transfers reportedly play a large role in keeping people above the poverty threshold, and the number of people at risk of poverty would almost double if social transfers were excluded from consideration.

26. Other determinants of hardship are equally relevant in assessing poverty. Around 7 per cent of the country's older persons are severely materially deprived. This means that they cannot, for instance, afford unexpected expenses, a meal with meat, chicken or fish every second day or to adequately heat their home.

27. The high level of poverty among older persons affects their access to adequate housing. In many cases, they live in inadequate private homes because they cannot afford the monthly expense of adequate housing. Adequate housing for older persons is dictated by the needs of this sector of the population. Key considerations in this regard include accessibility and barrier-free housing, the independence and autonomy of older persons and enabling them to take part in all aspects of social life. In 2011, the Ombudsman recommended developing home help services at affordable prices.

28. Moreover, about a third of older persons in Slovenia have difficulty accessing basic services in their local environment, including health services. This exclusion is particularly problematic since older persons are less mobile and more dependent on the local environment.

29. Older persons living in rural areas in particular, notably the older farm population in Slovenia, face substantial social marginalization. Rural areas in Slovenia continue to lose vital social institutions, such as cultural centres and libraries, bus and rail connections are diminishing and grocery stores are replaced by supermarkets which move out from central neighbourhoods to peripheral areas.

30. The Independent Expert notes that poverty among older persons in Slovenia is an area of concern, notably among older women living in single households and older persons belonging to minorities and other marginalized groups, who are disproportionally affected thereby. In the light of the intensity of the population ageing, however, and the number of older people due to rise dramatically in the years to come, there is a need to urgently adopt measures to address the issue of poverty in old age and to ensure equal access to services.

[6] *Europe in figures – Eurostat Yearbook 2011*, table "At-risk-of-poverty rate of older people by sex and selected age groups". Available from http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ilc_pnp1&lang=en.

D. Social protection and the right to social security

31. In article 50 of the Constitution, it is provided that citizens have the right to social security, including the right to a pension, under conditions provided by law and that the State shall regulate compulsory health, pension, disability and other social insurance, and shall ensure its proper functioning.

32. The Slovenian social security system encompasses social insurance, family benefits and the social assistance scheme. Social insurance schemes consist of mandatory pension and invalidity insurance, mandatory health insurance, unemployment insurance and parental protection insurance. These are compulsory for all employed and self-employed persons.[7]

33. The pension system is currently based on three pillars complemented by the provision of social assistance in order to ensure a basic safety net for people in need, namely the mandatory earning-related pillar of the pension; the private pension plan, which is voluntary for private sector employees and mandatory for public employees and persons employed in arduous occupations; and individual savings in pensions and life insurance vehicles. Premiums paid to the third tier are subject to a tax relief.

34. Important changes were introduced to the country's pension system with the 1999 Pension and Disability Insurance Act, which tightened the eligibility criteria by increasing the retirement age and lowering the value of the entry pension. A second reform implemented in 2013 aimed at cutting the cost of State pensions and raising the age of retirement again.

35. The general retirement age in Slovenia is 65 for both genders. Retirement is also possible at 60 years of age on the basis of 40 years of service. In addition, to be eligible for pension, a person must have been a resident of Slovenia for at least 30 years between the age of 15 and 65.[8]

36. Insured persons are encouraged to work longer and defer retirement. If an insured person works longer than 40 years or retires after reaching retirement, a calculation bonus (a certain additional percentage) is awarded.[9]

37. More than a quarter of the Slovenian population is retired. In the past two decades, the number of individuals receiving pensions in Slovenia has increased by almost one third. In 2012, retirees numbered approximately 600,000 persons. While the number of insured persons has also risen during the same period, this increase was significantly less (only about 12 per cent) and the ratio between insured persons and retirees has therefore continuously deteriorated from around 1.7 employed person per retired person in 1992 to 1.5 in 2012.[10]

38. The average old-age pension in Slovenia in 2014 was €612.63, with a gender difference of an average of €150. Women's pensions are lower primarily due to a lower pension-rating base, as a result of lower earnings, and the length of the qualifying period.

---

[7] See European Union, *Your social security rights in Slovenia* (2013), p. 5. Available at http://ec.europa.eu/employment_social/empl_portal/SSRinEU/Your social security rights%20in Slovenia_en.pdf.

[8] See **Error! Hyperlink reference not valid.**

[9] See European Union, *Your Social Security Rights*.

[10] See Slovenia, Statistical Office of the Republic of Slovenia, *Older people in the labour market* (Ljubljana, 2014), p. 24. Available at www.stat.si/StatWeb/Common/PrikaziDokument.ashx?IdDatoteke=1213.

39. The Independent Expert notes that, while important adjustments have been made to the pension system, there is further need to adapt the existing social protection systems to population ageing.

E. Education, training and lifelong learning

40. Slovenia has a strategy for lifelong learning and there are numerous educational possibilities for older persons. Since the country's first Third Age University was established in 1984, the network of such universities has grown significantly (46 universities in 44 localities). Education in old age is important for personal growth, paid or non-paid work, active citizenship, local development and consolidating intergenerational relationships.

41. There are, however, significant differences in educational possibilities for older adults in rural and urban municipalities. Educational opportunities for older persons in rural municipalities are often provided by voluntary associations, which offer non-formal educational and leisure-time activities, while urban municipalities provide different formal and non-formal educational possibilities for older people.

42. The readiness of older adults to enroll in education not only depends on the extent of educational opportunities available in a municipality, but also on the various measures for encouraging the participation of older people in education. Moreover, a low level of participation in education is often connected to a low level of education and the poverty of older people, regardless where they live.

F. Care

1. Institutional care, home care and informal care

43. Institutional care for older people remains predominant in Slovenia. In recent years, other forms of care, such as day-care centres, social home care for older people or living arrangements with supported housing, have also started developing. For example, around 5 per cent of the population aged 65 and above lived in homes for the elderly and 4.7 per cent of the population aged 65 and above received home-based care (social and nursing care).

44. A study carried out in 2001 indicated that three quarters of older persons would choose to live in an old people's home and that only less than one fifth would choose to stay with their children.[11] Among the reasons to opt for an old people's home were the fear of becoming a burden to the family and the lack of other non-institutional solutions.

45. Around 5 per cent of older persons in Slovenia live in older persons' homes, and while the capacity of older persons' homes is continuously growing, demand continues to exceed supply. In 2014, 17,088 people in care were living in older people's homes, while around 2,700 applicants were waiting for admission.

46. Older women constitute the largest proportion of persons in older persons' home (nearly three quarters) and that proportion continues to increase.

47. Eighty percent of homes for older persons are operated by the public sector, supplemented by homes within the private sector which essentially offer the same services, but are generally more expensive than public ones.

[11] See Simona Hvalič Touzery, *Supporting family carers of older people in Europe – the national background report for Slovenia* (Hamburg, Münster, LIT Verlag, 2007).

48. Not all older persons in Slovenia have equal opportunity to access institutional care. While at the national level the accessibility of services and social-care programmes has been improving, there are significant differences at the municipality level, depending on the size, the degree of urbanization and the economic development of the municipality in question, which affect, among others, the availability of institutional care. Overall, quality of life in old age seems to strongly depend on where older persons live, taking into account that older persons do not normally move when reaching retirement.

49. Moreover, institutional care in Slovenia is understaffed and those taking care of the older persons have inadequate training, as they lack specific gerontological knowledge.

50. Integrated care in Slovenia is emerging only now, although it is recognized to be more beneficial for older persons. Some good practice emerged, such as the Sunny Dale older persons' home, which provides autonomy for those capable of caring for themselves, and also caters for their needs if and when a resident's care situation deteriorates. It thus allows residents requiring assistance with health and social care to remain in one place with their varying care needs being met under one roof.

51. Home care, including long-term care services, falls within the responsibility of municipalities. They grant licences to home care providers and supervise the quality and provision of care. While working hand in hand with home care, home nursing is organized by primary health-care centres in the municipalities.

52. Slovenia lags behind other European countries in the provision of help for older persons living at home. Many of the laws and national plans have not been implemented, and there are only few services for family carers and they are not provided nationwide. For instance, home care on weekends, during holidays and in the afternoons is available in less than half of the municipalities.

53. In 2004, Slovenia introduced "family helpers" as an alternative to institutional care for persons with disabilities, who need permanent care, attendance, help and assistance. Family carers can themselves become family helpers and receive a financial compensation. The amount of compensation received is not, however, sufficient to influence the decision whether to care for an old family member. The Centres for Social Work monitor the care provided and social inspections also examine the work of the family helpers.

54. In addition to home nursing and social home-help services, which are the most important sources of practical help to older persons and their carers, day-care centres, sheltered housing and remote help (a lifeline system) have also been developed in recent years, but remain largely insufficient in the light of the growing demand.

2. Long-term care

55. Long-term care in Slovenia is fragmented and regulated under several different legal acts, particularly the Social Security Act. Other areas of long-term care are regulated in the Health Care and Health-Care Insurance Act, the War Veterans Act, the War Disabled Act, the Pension and Disability Insurance Act and the Social Care for Mentally and Physically Handicapped Persons Act. In spite of long-term care being addressed in a number of legal acts, it remains largely unregulated and current legislation is inadequate to meet the growing demand for it. New legislation on long-term care and long-term insurance has been under preparation since 2005, but has still not been enacted. The Independent Expert was pleased to learn during her visit that the draft law adopts a human rights-based approach and urged the Government to swiftly adopt the new legislation.

56. A number of measures were taken in recent years to meet the growing demand for long-term care, including building new homes for the elderly and increasing the capacities of existing ones. In addition, specialized nursing wards in hospitals and prolonged hospital

stays were introduced. With an increasingly ageing population, this will not be sufficient to meet the demand for long-term care and the needs of older persons.

57. Long-term care and health care are regulated under different legislation and financed by different stakeholders. Owing to the nature of the services, it is sometimes difficult to define the area to which the services belong and the categorization of the services is sometimes unclear, for example for prolonged hospital stay.

58. Services that are ensured for older persons in institutional care, such as physiotherapy, are not generally available for those being cared for at home. And there is a need to ensure that all older persons have access to the same services irrespective of the type of care and the place of residence.

3. Palliative care

59. Slovenia has the National Palliative Care Programme and an action plan on the issue which was finalized in 2010, but progress in the area of palliative care in Slovenia is slow and follows the pattern of care in general, i.e. it focuses principally on institutions and less on home care.

60. There are one inpatient palliative care unit at the specialized Golnik hospital and three hospices, but there are no beds. There is also a number of hospital beds (around 20 to 30) used for patients receiving palliative care at the Institute of Oncology in Ljubljana, but they are located in various departments. Financing and classification of palliative care standards at the national level is not well coordinated, and there is no tradition of teamwork in multidisciplinary teams.

4. Quality of care

61. Monitoring and quality assurance of care is not regulated in Slovenia. The main mechanism to assess quality of care in the field of long-term care is inspections. The Ministry of Labour, Family, Social Affairs and Equal Opportunities is responsible for social inspections and the Ministry of Health for health-related inspections. Social inspections are mainly concerned with labour relations and safety, as well as health at work and other tasks related to surveillance. Social inspections are also used to instigate the design of system solutions and other materials for the exercise of supervision and inspection of social work and materials for annual and other reports, and the production of various materials and documents for the inspection work. Social inspectors also monitor the volume and quality of the care provided (in accordance with the Social Security Act). Monitoring of and quality assurance for informal care is limited, and it is mainly the introduction of the family helpers in 2004 that brought about some supervision in this area through the regional Centres for Social Work.

62. The Independent Expert was informed that the long-term care and long-term care insurance act under preparation gives special attention to the education of long-term care providers and introduces a special chapter on quality assurance. She notes, however, that the new law focuses on quality standards and effectiveness indicators instead of quality indicators and seems to give more attention to monitoring and inspection of providers than quality assurance itself. There is also a need to clarify the scope of the chapter and to ensure that it encompasses institutional care as well as home care and informal care.

V. Conclusions and recommendations

63. **The Independent Expert commends the commitment of Slovenia to the rights of older persons at the national and international level. She also recognizes the high level**

of awareness of the subject matter and the priority accorded to ensuring the enjoyment of all human rights by older persons by all stakeholders and civil society actors in Slovenia. The impressive number of normative actions, policy support and societal initiatives, as well as government measures, has contributed considerably to the overall relatively high standard in the enjoyment of all human rights by older persons for the majority of its population.

64. The Independent Expert further recognizes that Slovenia has a good normative framework, but notes that there is still room for improvement in practice and that some of the relevant laws have not been fully implemented. Given the intensity of ageing, providing older people with adequate pensions, high-quality health care and gainful employment will become an even greater challenge in the decades to come. There is thus a need to act swiftly and more strongly to pursue efficiency-enhancing reforms of social support systems to ensure their sustainability over time.

65. The Independent Expert is pleased to learn that further measures, training and educational initiatives, as well as other projects and programmes for older persons, are planned, which reflects the Government's political will and commitment to the promotion and protection of the enjoyment of all human rights.

66. The Independent Expert stresses the importance of creating conditions and possibilities for cooperation and solidarity between and within all generations and of a comprehensive and coherent strategy for the realization of all human rights by older persons, with a focus on marginalized persons and groups. She therefore urges the Government to deploy additional efforts to finalize the new Strategy for Quality Ageing, Solidarity and Coexistence of Generations in Slovenia by 2020 as a means to further mainstream ageing in all policy fields. While acknowledging the role played by the National Council for Solidarity and Coexistence of Generations, the Independent Expert considers that a dedicated lead agency with substantive cross-cutting competencies, as well as mandatory consultative and advisory services, would further contribute to human rights-based responses in policy, law and practice and to adequately prepare for the future challenges of ageing.

67. The Independent Expert recommends that Slovenia ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights as well as all conventions of the International Labour Organization that are relevant to older persons. As a member of the Council of Europe, Slovenia should, inter alia, ensure implementation of recommendation CM/Rec(2014)2 of that organization's Committee of Ministers to member States on the promotion of human rights of older persons.

68. On the basis of the findings and observations in the present report, the Independent Expert makes the following conclusions and recommendations.

I. Laws and policies

69. The Independent Expert encourages the Government to expedite the review of relevant legislation and calls upon the Government to amend it, if necessary, so as to ensure the actual implementation of laws and policies by local authorities and/or municipalities in accordance with applicable law for the realization of all human rights to all older persons, regardless of their ethnic or social origin or any other characteristic. She reiterates that human rights obligations pertain to all levels of government, and calls on the Government to ensure that all people and older persons in Slovenia are able to enjoy rights on an equal basis. Special attention and efforts are needed to ensure access to basic services and the realization of older persons' economic, social, cultural, civil and political rights in Roma settlements, including by

means of broad-based participation and consultation with Roma and their representatives and advocates.

2. Awareness-raising and training

70. The Independent Expert reiterates the importance of raising awareness and changing peoples' attitudes and beliefs towards older persons at all levels of society, in accordance with the Government's acknowledgment of the role played by older persons in society and its emphasis of the intergenerational dialogue, which are good examples in the context of the challenges faced by a multilingual, multicultural and multi-ethnic society. International human rights law, such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities and other relevant instruments; principles and standards, including the United Nations Principles for Older Persons and general comment No. 6 (1995) of the Committee on Economic, Social, and Cultural Rights on the economic, social and cultural rights of older persons, should be further popularized and made much more publicly available. In addition, relevant domestic law and legislation has to be popularized in conjunction with a nationwide awareness-raising and sensitization campaign to educate older persons and in particular those marginalized in the realization of their rights of the available remedies to enable them to pursue legal action and exercise their rights.

71. There is also an urgent need to adopt a strategy to raise awareness regarding the issue of violence against older persons and to train law enforcement authorities and the judiciary in the handling of cases of family violence. Awareness-raising campaigns need not only target older persons themselves, but family members in particular, and sensitize broader communities.

3. Study and statistics

72. The Independent Expert encourages the Government to ensure nationwide, systematic and regular collection of disaggregated data on the impediments to the enjoyment of all human rights by older persons, such as all forms of discrimination on the basis of age as sole or accumulated criteria, on exclusion and on all forms of abuse and maltreatment. Given that data have to be used sensibly to avoid stigmatization and potential misuse, particular care should be exercised when collecting and analysing data to respect and enforce data protection and privacy.

73. Thorough evidence-based analysis of the current and future needs of various forms of care or affordable, accessible and barrier-free housing is a precondition to meeting immediate needs, planning and preparing for the future and developing appropriate measures to ensure an inclusive society for all ages.

4. Discrimination

74. The Independent Expert emphasizes the need for an anti-discrimination strategy addressing discrimination in a coherent and multifaceted way, in order for the Government to have comprehensive overview of the level of human rights enjoyment of the population, particularly of the most vulnerable groups, including older persons, and hence to have a clear picture on what the effects of legislative and, particularly, austerity measures have on human rights standards in Slovenia.

75. Although the Government has taken important steps to protect the rights of Roma people in Slovenia, and while the situation of Roma in Slovenia is a complex

one, the Independent Expert notes that discrimination against Roma remains widespread and that the low numbers of older Roma is illustrative of this situation. She urges the Government to ensure that, pending the adoption of the new national strategy for the next five-year period currently being drafted, the National Programme of Measures for Roma 2010-2015 is fully implemented in all municipalities, and to take urgent measures to eliminate all forms of discrimination, including de facto discrimination, and to ensure access to basic services and security of tenure for all Roma communities.

76. The Independent Expert notes the progress made in recent years to regularize the status of "the erased" and welcomes the creation of a compensation scheme. There is an urgent need to guarantee the rights of the dwindling number of former permanent residents of Slovenia.

77. In the light of the difficulties faced by older persons in accessing financial and insurance services and resources, the Independent Expert recommends that businesses adhere to international standards preventing, inter alia, all forms of discrimination and to the Guiding Principles on Business and Human Rights, which provide guidance on responsible contracting and State-investor contract negotiations.

5. Violence and abuse

78. The Independent Expert calls on the Government to devise a comprehensive strategy for the protection of older persons from violence and all forms of abuse. While domestic violence legislation in Slovenia specifically refers to older persons as a group, it is not sufficient to place elder abuse under another form of abuse in legislation and regulation measures. Risk factors and forms of abuse of older persons are often very specific and therefore legislation sensitive to the specific vulnerabilities of older people is needed in order to effectively prevent and address elder abuse.

79. The Independent Expert encourages the Government to take further measures to ensure that elder abuse is prevented, detected and reported at all levels and in all settings and that cases of elder abuse are investigated and prosecuted. Stakeholders across multiple sectors and disciplines, including law enforcement and prosecutors, need to be trained on preventing, detecting, intervening in and responding to elder abuse, neglect and exploitation. The Independent Expert also notes that the particular vulnerability of older persons needs to be taken into account when designing complaint mechanisms.

6. Adequate standard of living

80. The Independent Expert notes that poverty among older persons in Slovenia is an area of concern, notably among older women living in single households and older persons belonging to minorities and other marginalized groups, who are disproportionally affected by it. Given that the number of older people is due to rise dramatically in the years to come, measures to address the issue of poverty in old age and to ensure equal access to services should be urgently adopted.

81. The Government should immediately adopt a housing policy that takes into account the special needs of older persons to enable them to live independently. Ageing at home will increasingly require innovations in the housing sector, including alternative forms of housing for older persons. Engineers and architects' awareness of the implication of their profession on the enjoyment of all human rights by older persons is essential. The Independent Expert recommends fostering a human rights-based approach to securing the involvement that conforms with human rights of architects and engineers in the design of public and private buildings.

7. Education, training and lifelong learning

82. The Independent Expert welcomed the initiatives taken to provide educational opportunities to older persons in Slovenia, but noted that further steps should be taken to improve these opportunities in both rural and urban municipalities and to ensure equality of access. Measures should also be taken to facilitate access of older persons to normal universities, including outreach activities to target prospective older students. Educational programmes for older persons should be free of charge and accessible to all older persons and should be based on the specific needs of older persons. There is, moreover, a need to ensure accessibility of information, educational counselling activities and competent and trained staff in education.

8. Care

83. The Independent Expert notes that the new legislation on long-term care and long-term insurance has been under preparation since 2005, but has still not been enacted and urges the Government to give priority to the health reform, notably the introduction of an insurance-based residential and home care system.

84. In the light of the intensity of ageing, the Independent Expert recommends developing geriatric health services in order to ensure comprehensive, compassionate care that recognizes the special needs of older persons, with a view to optimizing their quality of life and functional ability. She also emphasizes the importance establishing a separate department for health care of older persons at the central level in relevant ministries and specialized care units for older persons in hospitals.

85. The co-financing of institutional and social home care by central and municipal governments is vital in enabling accessible care for older people and should be continued and further expanded given the high level of poverty among older persons. While, according to the Local Self-Government Act, care for older persons falls within the responsibilities which are carried out independently by the municipalities, the Independent Expert notes that it does not absolve the Government of its human rights obligations, including ensuring the material conditions and human resources necessary for municipalities.

86. The Independent Expert stresses that promoting home care for older persons is essential and that adequate parallel support to their family members and other informal caregivers needs to be provided. Family carers require broader community support and professional assistance, respite care services, needs assessment, counselling and advice, self-support groups, and practical training in caring and protecting their own physical and mental health, weekend breaks and integrated planning of care for elderly and families.

87. The Independent Expert encourages the Government to pursue the process of deinstitutionalization of care and to prepare an action plan for deinstitutionalization, including the parallel development of community-based services in consultation with civil society, local communities and older persons themselves. She notes that, in order to do so, basic conditions must be fulfilled. These include providing accessible (i.e. barrier-free and price-accessible) housing, accessibility towards public services and various kinds of assistance, peer support and other supportive community-based services. Active participation of older persons and their families in the process needs to be ensured.

88. Community-based care requires an integrated approach, including continuous monitoring and evaluation, as well as coordinated cooperation among all stakeholders involved in the area of housing, social and health care, education, employment, culture and spare-time activities.

89. Community-based services have to be tailored to the needs of older persons in full respect of their physical and psychological condition, as well as their social and cultural condition. This requires the establishment of clearly defined benchmarks which can be assessed and verified as well as sufficient and well-trained staff with skills appropriate for community-based care as well as adequate support to families.

90. Measures need to be taken to eliminate the differences in the accessibility of long-term care and to equalize access for older persons. The differences among regions are also to be eliminated, as are the differences in access to services for those who use such services at home and those who use such services in institutional care.

91. The Independent Expert calls on the Government to ensure availability and accessibility of palliative care for all older persons in need, particularly those who suffer from a life-threatening or life-limiting illness to ensure their well-being and allow them a life with dignity.